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The Story of  
The British Constitution





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# The Story of The British Constitution

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## PREFACE

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This book has been written to supply a need which the author has experienced in the course of his work of teaching. For several years he has included Constitutional History in his Sixth Form syllabus, but has failed to find a suitable text-book for his purpose. While, on the one hand, there are numerous treatises of university degree standard, and, on the other, sundry simple books on " civics ", he has been unable to find one just suited for the top forms of secondary schools. The present volume, based on teaching notes, is an attempt to fill the gap. It is also suited, the author believes, to the needs of evening-class students, and he hopes it may find its way into the hands of those general readers who are interested in the historical aspects of politics.

It is hoped that a book so designed may lead to the study of the British Constitution in many schools where at present it finds no place. Apart from general cultural considerations, it is essential that our scholars should have a thorough understanding, based on an historical perspective, of the national institutions they will one day help to control.

To treat simply a subject so complex as the history and present working of the British Constitution is a task bristling with difficulties. The problem of the selection of facts is not easy of solution. Where a large treatise can



discuss a doubtful point, a small text-book has often to make a choice between several different theories—all of which may be equally uncertain—and state the one selected as if it were an undisputed fact. The development of the Curia Regis, for example, provides more than one instance of this difficulty. The indulgence of more advanced readers is therefore craved at such points.

For the purpose of exposition, the subject has been arranged in topics. This division into sections, of a story which is essentially one whole, has involved frequent repetition of basic or connecting facts in order to emphasize the underlying unity. No attempt, however, has been made to explain every detail of the Constitution or of its history: the book is not intended to supersede either a teacher or reference to larger books.

The author is particularly indebted to the volumes mentioned in the appended "Suggestions for Further Reading". Where that indebtedness is especially marked and conscious, acknowledgment has been made in foot-notes.

He is further indebted to friends who have been kind enough to read sections of the work in manuscript. Notably the chapters on the *Judicial System*, *Local Government*, and the *Process of Legislation* have benefited by friendly criticism for which he takes this opportunity of expressing sincere thanks.

NUNEATON, May, 1929

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## INTRODUCTION

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These are days in which everyone has a share in the government of the country. No matter who we are, we either actually have, or know that we soon shall have, political power in the shape of a vote for a Member of Parliament. It is desirable, therefore, that everyone should have some knowledge of the institutions which he—or she—helps to control.

The aim of this book is to explain the working of those institutions through which the government of our country is carried on, that is, of those institutions which together make up the "British Constitution".

Now, this same British Constitution, like so much else that is British, is not the outcome of any definite or deliberate resolution, but has grown up gradually. Indeed, more than one of its principal features are traceable to some chance circumstance; for, so great has been the reverence of our people for what is past, that a course of action once adopted tends to be repeated in similar circumstances.

This is one of the distinguishing features, in fact *the* distinguishing feature, of the British Constitution. Almost, if not quite, every other civilized country has its form of government fixed by a code of laws. Such a code contains definite regulations about the powers of the Head of the State, about how many Houses of Parliament there shall be, how the House or Houses shall be constituted, and so on. Also, no alteration



of any kind can be made in such a constitution except by a process of amendment made highly complicated so as to render amendment difficult. America and France are examples of countries with such codes of laws. The British Constitution, on the other hand, is not fixed by any such body of law. Some of its most vital elements are not even recognized by any Act of Parliament. This is notably true, for example, of the Prime Minister and the Cabinet. Further, those parts of our Constitution which are fixed by Act of Parliament can be altered by the ordinary process of law-making.

We may note, in passing, that the former kind of Constitution, fixed by definite laws and not easily alterable, is called a Rigid Constitution, while the British Constitution, being of natural growth and readily adjustable to changing conditions, is called Flexible.

It will be seen at once that the connexion between the British Constitution as it stands and the process that has produced it, is so intimate that no understanding of the Constitution's present working can be real or adequate without some knowledge of how it has come to be. It is this fact which is to be the basis of our study. Having followed, in our opening chapters, the primitive, simple government of England in early days, that is, the government from which all our later government has grown, we shall trace in order the main features of our present Constitution with some account of their present functions and procedure.



# THE BRITISH CONSTITUTION

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## CHAPTER I

### BEFORE THE NORMAN CONQUEST

The earliest period during which England began to develop anything that can really be called a Constitution was in the times of the Anglo-Saxons, that is, some five centuries prior to the Norman Conquest. In those early days life in general—including government in particular—was much less complex than it is in these. Yet the problems which faced the earliest national rulers were really the same as those facing our national rulers to-day; and the basic principles of government which were sound for those times are equally sound for these. To examine the principles of national government, as carried out under the Anglo-Saxons and shorn of much modern elaboration, is therefore an excellent introduction to the whole subject of constitutional government.

The changes which succeeding centuries have brought in the conditions of life and in the outlook of the people must mean, of course, that our problems and the principles of our governmental system will take different



forms from those of our forefathers. But these are differences of appearance only and not of essence.

**Difficulties of the Subject.**—It is just as well to begin by confessing that, connected with this early history, there are many points about which we have only very vague information. Often as we proceed we shall have to safeguard statements by some such qualifying phrase as “so far as we have any evidence”, or “approximately”, or “probably”. A little reflection makes the reasons for this plain. Most of the customs of which we have records were perfectly familiar to the men who compiled the records, and so, because they were not writing for our benefit but only for some particular purpose of their own, it never occurred to them to explain the terms they were using, any more than we explain the use of familiar articles if we refer to them casually in a letter to a friend. All that we can often do is carefully to compare references to obscure customs in various documents and so try to guess their meaning.

The difficulty of interpretation is further increased by the fact that there was very little writing at all. About the times in which we live there will be masses of evidence in future ages through the books and illustrations which to-day abound. But we are much less fortunate when we try to understand the life of the Middle Ages. Moreover, because of the rarity of written records, men had to be guided largely by tradition and custom, and such customs varied enormously from district to district. Thus, the services which a villein rendered his lord in one shire might be quite different from those in the adjoining shire. Even the measures of land differed from place to place, and, even in any one place, only approximately corresponded to the supposed standard. This variety and uncertainty of



meaning are factors we must bear constantly in mind in our study of mediæval life. With these provisos in mind, we may approach the history itself.

## I. THE KING

**Origin of Kingship.**—At the head of the government then, as now, was the king. Among the Anglo-Saxons the development of the kingship was due mainly to two factors, one being a general factor operating universally, the other being particular to the circumstances of the times.

The first was the influence of kinship. The only natural tie between groups of individuals is the tie of blood-relationship, so that the natural social group is the family. The head of the family, therefore, acquires great respect and authority. As the kinship group increases in numbers and in the territory which it controls, this head of the family becomes the chief of a tribe and, ultimately, the king of a state. Examples of this process are still to be found, of course, among peoples in different stages of social and political development in various parts of the world. Whether the Anglo-Saxons came over in whole tribes of warriors or whether—as was far more common—they came in smaller foraging parties, all the members of each body of invaders would belong to the same family group. This family influence on the development of the kingship is indicated by the derivation of the word “king”, the Anglo-Saxon for which is “cyning”, the root of it being their word “cyn”, meaning a tribe or kin or race.

The second, and particular, factor was that each expedition, whether on a large or on a small scale, would need a leader. It was natural that he who had



been the leader of the invasion should be also the leader of the invaders after they had settled in their new country.

**Basis of Authority.**—These two factors, affecting the origin of kingship, continued in principle to affect its character for several centuries at least. Even from the earliest days, one family—the descendants of the leader of the dominant tribe or people—was regarded as the family from whom the king should be chosen. But it was not always the head of the house who was chosen. One of the chief duties of the king was to lead the people in time of war. Even during the periods of comparative peace, in a primitive society where rules of government were not yet established, the personal character of the king was of vital importance. Hence the crown was given to the strongest man in the royal family; so that, if descent by strict hereditary right would have given the crown to a child or to some other incompetent person, another member of the house was chosen instead. A notable example of this is afforded by King Alfred. Alfred succeeded his brother Ethelred I although the latter had young sons who therefore, according to the strict rules of primogeniture, had better claims than Alfred had.

This absence of any strict inviolable rule of succession meant that someone or some body of people had to choose the king. We should expect this to be done by the people as a whole through their representatives. But no representative assembly existed, and all that seems to have happened was that the great men personally acknowledged as king him who, by descent and character, was the obvious man for the position. The bulk of the nation was then content to accept as king the man acclaimed by the nobles. No body of men, however, had any *right* to choose a king, though doubt-



less no king would feel comfortably safe until the great men had definitely shown their support.

## 2. WITAN

The assembly in which these "great men" met was the Witanagemot—the meeting (gemot) of the wise men. This, of course, must not be interpreted to mean "wise" in the modern sense of "learned" or "literary": it meant simply capable men, especially capable of giving the king sound counsel.

**Membership.**—It will be seen at once that the Witan was not a "folk-moot"—a "meeting of the people". The popular assemblies were the local assembly of the shire and of the hundred. The central assembly was originally not much more than the king's council to which the king summoned whom he would. Gradually, however, certain classes of men seem to have acquired the right to attend. These included the great officials of both church and state—the bishops, the greater abbots, and the ealdormen of the shire courts—and also a group of people whose position depended upon their personal relationship to the king and whose numbers steadily increased.

The basis of this personal relationship was a military one. Quite early in the days of the Saxons we find the king surrounded by a band of "gesiths" who were his personal followers, being bound by oath to fight for their lord. They were professional warriors. To the members of this bodyguard the king made grants of land, and gradually, as this happened, we find the gesiths having a new name: they are the king's "thegns". We must beware in this, as indeed in every other respect, of reading the sharply defined meanings and relationships of later days into this primitive period. But these



thegns do seem to be nobles whose rank depended upon land-holding. What we are immediately concerned with is that the thegns always had places on the Witan. In number they seem to have outweighed all the other members. Thus, in a Witanagemot which met at Luton in November, 931, there were 2 archbishops, 2 Welsh princes, 17 bishops, 15 ealdormen, 5 abbots, and 59 thegns.<sup>1</sup>

In addition to those who were regarded as having a rightful claim to membership of the Witan, the king could always summon others whom he might wish personally to honour or placate. The personnel of the Witan, therefore, depended considerably upon the particular character of the king.

**Functions.**—To a large extent this was true also of the work of the Witan. Not only in its composition but also in its functions the Witan differed widely from the modern House of Commons. Indeed its real significance historically is that it combined all the functions of government—executive and judicial as well as legislative—and therefore to it all our present-day institutions of central government are traceable.

Its meetings were not very regular, though it met usually three times a year, at Christmas, Easter, and Whitsuntide. Nor do its sessions appear to have been long. This must have meant that the details of government were carried out by the local assemblies and not by the central government. This, indeed, is the most outstanding of the differences, to which we referred at the beginning of this chapter, between the government of Anglo-Saxon times and the government of to-day.

<sup>1</sup> Stubbs, *Constitutional History*, quoted Maitland, *Constitutional History of England*, p. 56.



## 3. IMPORTANCE OF LOCAL GOVERNMENT

To-day the most important functions of government are fulfilled by the Central Government, that is, by the Cabinet, the Houses of Parliament, and the great offices of state; in Anglo-Saxon times government was carried out by Local Government authorities in the shires and hundreds and villages.

**Influence of Invasions.**—The reasons for this practice are not difficult to discover. To begin with, the Angles and Saxons and Jutes and the rest did not all come over in one great organized expedition, neither did they conquer Britain as a whole. What we call “The Anglo-Saxon Conquest” covered a long period of years and was carried out by a number of separate and more or less independent parties. Each of these subdued some part of the island where they remained in fairly permanent settlement, each such settlement being independent of others.

Later, as the result largely of inter-tribal wars, many such settlements were united until the whole of England was divided into only seven divisions known as the “Heptarchy”. Finally, in A.D. 802, Egbert, the King of the West Saxons, united all England. But though that union was maintained, England remained for long a union of separate kingdoms rather than one united whole. In such circumstances it was natural that the actual government of the people should continue on much the same lines as those followed before the union; in other words, that the government should be local rather than central.

**Lack of Communications.**—There was another, and perhaps even stronger, practical reason for this, namely, the lack of communications throughout the country. Large areas of the island were then covered



with dense forest difficult to penetrate. Even in the more accessible districts, the only means of communication was by the merest track. The only roads were those which had been made by the Romans and which were already fast falling into disrepair. It is easy to understand that, under such circumstances as these, the effective government of the whole of England from any one centre was in practice impossible.

Hence, mainly for these two reasons—the previous history of the tribes and the difficulties of communication—in Anglo-Saxon England it was the local courts rather than the central assembly which discharged the functions of government. These local courts were of three classes: the Hundred Court, the Shire Court, and the Manorial Court. We examine them in that order.

#### 4. HUNDRED COURT

**Meaning of “Hundred”.**—First of all the term “Hundred” needs to be explained. This is one of the terms about which our information is vague and based partly on guesswork. The position seems to be as follows. Our forefathers, the Angles and Saxons, came originally from a north German coastal district called Frisia. According to Tacitus, a Roman writer of the second century A.D., the German tribes of that district were commonly divided into groups of a hundred warriors. Each “hundred” was organized by a leader who was also responsible for the general government of his group. But the earliest definite reference to hundreds in England is some eight centuries after Tacitus, and we have no proof at all that the origin of our hundreds is to be found in such groups of a hundred warriors coming over with their respective leaders who afterwards became the rulers of the districts in which they settled.



What seems a far more likely explanation is this: as the population of England grew and as larger areas came under the rule of one man, some subdivisions of the tribe became increasingly necessary for carrying out the details of government. Now, we know that among the Franks across the Channel there did survive fairly small divisions of population or land called "centena", that is, "hundreds", each of which was a unit for judicial and administrative purposes. The suggestion, therefore, is that at some point in Anglo-Saxon history the existing division of "shires" (with which we deal below) was subdivided and, on the analogy of the continental divisions, each section of the shire was called a "hundred". It is not surprising that Alfred the Great (871-901) has been credited by tradition with this piece of organization. Be that as it may, we have definite references in tenth-century laws which leave no doubt that hundreds were then in existence. Thus under Edgar (959-975) there was issued the "Ordinance of the Hundred", laying down rules about when the hundred court should meet, who should attend, and what should be its work.

**Hundred Court.**—The areas subject to the administration of the hundred courts varied a very great deal in different parts of the country. Some shires were divided into only about half a dozen hundreds while others had many more: Kent, for example, had over sixty. These differences might be accounted for by varying densities of population or by many varying local circumstances and traditions at the time the hundreds were organized, but now almost impossible to define exactly.

The court or moot of the hundred met monthly. This court had as one of its chief functions to pursue criminals and to bring them to justice, that is to say it was a police organization. It appears also to have been



a court of first instance for the men of the hundred, so that an accused was tried first by his hundred court. His case could be sent forward to a higher court (for example of the shire or of the king) only in case of appeal against the judgment of the hundred court and possibly if the crime were too serious, or if the offender were too powerful, to be dealt with by the local court. The official responsible for the conduct of the court appears to have been the "hundred man".

### 5. SHIRE COURT

Fortunately our information about this next local court is somewhat more definite and complete. The shire courts were the centres of all ordinary administrative and judicial work throughout the country. The evidence as to their activities, though more ample than that relating to the hundred courts, is not always easy exactly to interpret nor, especially in Anglo-Saxon times, was the practice of these courts uniform throughout the country. But at least we are on surer ground than when dealing with the hundred court.

**Origin of Shires.**—The shires, from the point of view of their origin, fall into about three classes. Some shires are the direct result of ancient kingdoms: there was a separate kingdom of Kent, another of the South Saxons (Sussex), another of the East Saxons (Essex), and so on. Other shires are the outcome of the amalgamation of tribes hitherto separate: thus the North Folk joined in the district of Norfolk and the South Folk in that of Suffolk. Yet other shires are the divisions of larger territories, such as Dorset, Wiltshire, and Somerset. Some of the shires, however, do not fall into any of these three groups. Apparently they correspond to the settlements of tribes who occupied vague areas which



had no definite boundaries but which gradually merged into the areas of neighbouring tribes. Each such tribe had a central settlement where its chief men lived and which was the centre of its government. This settlement was mostly in a town or large village which was already in existence and which, because it had thus become the governmental centre, gave its name to the tribe and to the area inhabited by the tribe. Evidence of this is to be found in the frequent correspondence between the names of the counties and of their respective county-towns in the midlands, whereas in the rest of England, where the origin of the counties was different, such correspondence hardly exists.

**Membership of Shire Courts.**—The shire court was the assembly which every free man of the shire was entitled to attend. This was the natural result of the origin of the shires. In the original, separate kingdoms and tribes of which the shires were the later territorial expressions, government was carried out by meetings of all the male members of the tribes, who audibly denoted their approval or disapproval of the proposals of their leaders. The shire-moot was the direct historical descendant of the primitive folk-moot: hence the attendance of every free man. If necessary for the business of the moot, every free man could be compelled to attend. For we must try to realize that it was by no means always a coveted privilege to be allowed to attend the shire assembly. The journeys necessary from extreme corners of the shire to the shire-town, without modern conveniences for travel, by lonely tracks through forest and waste were not likely to induce people to insist on the right to attend. Indeed more often they regarded attendance as a troublesome duty. To this was added another factor, namely, that such journeys occupied considerable time, and, unless



a man were sufficiently well off to leave reliable substitutes to carry on the work of his lands, his attendance at the moot meant considerable loss. Hence the necessity for compulsory attendance if there were to be enough men to conduct the business.

There was another, and very far-reaching, result of this burdensome nature of shire-moot attendance. Whenever men could, they dodged the duty. The class which had the greatest inducement to do this was that of the poorest freemen who could not afford to pay substitutes in their absence and who would not always be able to provide suitable animals to carry them the distance. The result was that, even before the Norman Conquest, attendance at the shire court was in practice limited to landed freemen. In large measure this simple fact explains why, even in modern times, the right to a vote for a Member of Parliament depended upon the possession or the occupation of property of a certain value. It is only in quite recent years that we have got back to the original and truly democratic principle of giving a vote to an individual because he is a *man* and not because of the property he owns.

**Court Officers.**—All this, however, is really aside from our main purpose. We had said that the shire-moot was the assembly of all the free men of the shire. The moot was presided over by the *ealdorman*. Originally the ealdormen of the shires had been chosen by the king and the Witan. In many cases the ealdormen were the descendants of the tribal or folk-rulers of the shires for which they were appointed. Partly for this reason and partly owing to the natural force of tradition and custom, the office everywhere tended to become hereditary. The ealdorman was thus the representative of the nation in the shire court.

But, though the ealdorman presided, it was the



sheriff who convened the moot—which he did twice a year. The sheriff, that is the shire-reeve, was really the king's reeve, his business being to represent the king's authority and to safeguard anything which especially affected the royal interest.

With these two there was also associated the bishop, who expounded the law of the church and protected the interests of the clergy, because the shire court dealt with ecclesiastical as well as secular cases.

**Functions of Court.**—To call the shire assembly a “moot”, that is a “meet”, as we have done, instead of a “court”, emphasizes that it dealt with much business besides merely judicial business, though its judicial functions were the most important. The usefulness of the shire moots, especially as judicial courts, became so marked that increasingly the king used them as his courts and sent representatives into them to dispense his justice. This aspect we shall describe in Chapter VIII when dealing with the development of the English judicial system.

The remainder of its work was, under the Anglo-Saxons, vague and not easy to define, at least so far as the facts are available to us. We shall do well, therefore, to leave the greater part of the work of the shire moot until we meet it again after its transformation, under the Normans, into the County Court.

Though the shire moot looms large in the story of Anglo-Saxon government, its real importance is not so much the part it played in the daily life of the ordinary man, but is rather that later it became the source of the English representative system culminating in the House of Commons.<sup>1</sup> The court of the ordinary man for ordinary purposes was the third of the system of local courts.

<sup>1</sup> Chapter VI.



## 6. MANORIAL COURT

*understandably explained.*  
? **Meaning of "Manor".**—That raises the whole question of the meaning of the "Manor". A manor was really a village, and in the Middle Ages each village was an almost entirely self-sufficing unit of population. Most of our information about the manor relates to the Norman rather than to the Anglo-Saxon period, but, as we now know that the effect of the Norman Conquest was not so much to bring a new system, but was to make more definite and clear the conditions already existing, our facts are sufficiently accurate.

At the head of each manor was a lord who was regarded as owning all the land of the manor. From him the men of the manor held portions of this land, in return for which they rendered certain services and dues to the lord. These services varied according to the status of the man relative to his lord. Put another way, the land held by the man from the lord corresponded to what we should call wages for work, while the services rendered on the lord's land corresponded to what we should call rent.

**Origin of Manorial System.**—This dependence of men on a lord arose in several ways. More accurately, perhaps, we ought to say that as time went on there were several contributory causes to the one movement. We have to assume that when a party of Anglo-Saxon invaders settled down here every man was a free man, since we can hardly imagine men taking the risks of such an adventure and then settling down as unfree. But however free and equal men might be originally, there were a number of circumstances which might upset that condition. In primitive societies men had no reserves or stores on which they could draw in times of distress, so that a run of bad luck in harvests or ill-



ness, or damage to crops and homestead by enemies, would be sufficient to render a man helpless. In such a situation he would be only too glad, in return for the immediate means of livelihood, to hand over his land to a more fortunate neighbour on whom henceforward he would be dependent. Quite apart from such extraordinary causes of inequality, there is the ordinary one that many men who are quite capable workers are nevertheless quite incapable when left to their own resources: they lack the requisite initiative and foresight. It would need very little ill-fortune to reduce such a man to the necessity of securing the help of a more fortunate or more capable neighbour. Such an emergency need happen only once in the history of any family to render the family permanently dependent on its momentary benefactor or protector and on his descendants or heirs.

**Classes of Men.**—Moreover, because the circumstances inducing a man to acknowledge a lord varied enormously, the resulting status of men relative to their lord varied correspondingly. Some men remained free men and rendered the lord only certain dues (probably in kind) and perhaps helped him at a busy season, such as ploughtime. Others were not free, and had to till the lord's land so many days a week as well as so many days at the busier seasons. This class of men, though we generally speak of them in a general way as "villeins", was itself composed of several ranks—villeins, bordars, cottars, coliberts. The exact meaning of these terms is never very clear, nor need it concern us here. All that matters for our purpose is that none of these men was what we should call a slave. To our minds, a slave is a thing, as much at the mercy of his master as a horse or a table. But the villein had rights, according to manorial customs and tradition, which he could enforce even against his lord. He could not leave



the manor on which he was born, but neither could his lord eject him: he might have to work two or three days a week, but his lord could not compel him to work four or five.

Below these classes there was, here and there, a small number of slaves, but whether even these were slaves strictly in our sense of the term is uncertain.

This process, by which a man took another man for his lord, was called "commendation". We must beware of thinking that it always implied the degradation of a man's status. Often, at least, there was mutual benefit: the lord obtained service and land, while the man obtained security and protection. Indeed, to be the "man" of a great lord might even bring a rise in status.

But, once the process was started, it became increasingly general. The political importance to the king of such a system soon became evident, for the lord could be held responsible for the good conduct of his men. So useful was it that Athelstan (925-940) issued a law saying that every landless man must have a lord, and, if he had not one already, his kinsmen must find him one. This holding of a lord responsible for the good conduct of his men brings us to the fact that every lord held a court for the men of his manor—the Manorial Court.

**Manorial Court.**—The manorial courts grew immensely in importance after the Norman Conquest, when they became the lords' feudal courts. Only after the Conquest did the relationship between a man and his lord become precisely defined, and hence it was only then that the proceedings of the courts became at all regularized. Here again, therefore, we cannot speak with certainty of the court-procedure in Anglo-Saxon times. But it is of the highest importance, as we shall



see in dealing with the results of the Conquest, to notice that, before the Conquest, the lord did hold a private court for his tenants.

In conclusion, what our study of the local courts of the Anglo-Saxon period leads us to may be thus summarized: slowly during that period there was developing a system of government through local moots whose procedure, because it depended mainly on custom and tradition, is vague and indefinite to us though doubtless it was sufficiently clear to the men of the time. The real importance of the system was that it stood ready for the use and more efficient organization of the Norman conquerors. It is mainly from this aspect that we shall study the meaning of the Conquest.

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## CHAPTER II

### EFFECTS OF THE NORMAN CONQUEST

The Norman Conquest and Feudalism are inseparably associated in the mind of everyone who knows even a little about our history. There may be some truth in the contention that that association is strongest in the minds of those who know only a little. But, be that as it may, the exact nature of the relationship between the two and its results are vital factors in the story we are following.

**Anglo-Saxon Feudalism.**—The basis of feudalism was a mutual obligation between a man and his lord, whereby the lord granted land in return for which the man rendered service either in arms or in work. The matter has only to be stated thus to make clear that feudalism was no new thing in Norman England. Our



study of Anglo-Saxon institutions has already established that all the essential elements of such a system had existed in England for generations before Senlac. That is the first point to be insisted upon: the feudal system was not introduced into England by the Normans.

**Changes by Normans.**—But in the system already in vogue the Normans made changes to an extent which transformed a loose, half-effete system into a sharply-defined, living system. In this sense, but only in this sense, was the feudalism of Norman times the work of the Normans. The form which this transformation took was the outcome partly of the circumstances resulting from the Conquest itself, and partly of the feudalism with which the Normans had been familiar on the Continent.

## 1. CIRCUMSTANCES OF THE CONQUEST

The circumstances resulting from the Conquest were governed by the fact that the overthrow of Harold did not involve the immediate, passive submission of the whole of England. William's victory at Senlac was only the first stage of a long process. Only step by step was the work of subjugation carried out. In some districts the work proceeded peaceably and quietly; in others it was completed only with brutal devastation as in the "harrying of the north". The culmination of the process was the submission of Hereward in the Isle of Ely in 1072.

**All Land the King's Land.**—Meanwhile there had been taking place gradually, and at first unobtrusively, a change which was to affect the lives of almost everyone. As William conquered England he took the land for himself and held it as his own; but, being unable to



till it and manage it all himself, he let most of it out again to others. Where the Anglo-Saxon holder had made no armed resistance and was likely to prove a not unfaithful tenant, he was often reinstated into his previous holding. No longer, however, did he hold his land in his own right. He held it through the graciousness of the king: he held it *of* the king and had to do certain services as an acknowledgment that he was the "man" of the king. Sometimes a tenant, even of a small quantity of land, held direct from the king and so owed his services direct to the king. Sometimes he held it through an over-lord—or a series of over-lords—who in turn held of the king. But always all land was the king's land.

**Holdings Scattered.**—More frequently, however, the land was not restored to its original owners but was given as a reward to Norman followers of William. In this way a very large proportion of the land—exactly how much is not easy to gauge—changed hands. But even these Norman lords held their land of the king. What was said above about some Anglo-Saxon tenants of even small quantities of land holding direct of the king, applies equally of some Norman tenants. In England the class of tenants-in-chief was a very numerous one relative to the total amount of land involved, many single knights' fees being held direct of the king. A knight's fee was the amount of land regarded as sufficient to support a single knight; but the extent and value of such holdings varied so much that to attempt to define them more exactly is useless, if not impossible.

The piecemeal nature of the Conquest went far to determine another and very significant feature of the holdings. As a district was subdued, William allotted much of it in portions to his followers. This was repeated stage by stage as the Conquest proceeded.



The result was that the same man might own a large number of relatively small areas scattered all over the country. In the aggregate, the holdings of some of the Norman nobles were very considerable, but no noble had his possessions in a solid block, as happened usually on the Continent where the great nobles held whole provinces. The only exceptions were the counties palatine on the borders of Scotland and Wales, which borders it was the duty of the rulers of those counties respectively to guard.

**Barons Weakened.**—The influence, on the power of the king, of this division of holdings is easy to understand. A baron whose estates are scattered is much weaker relative to the king than one whose estates are compact. If he quarrels with the king he can raise adequate bodies of troops only by drawing them from many different points all over England. This takes time, especially owing to the difficulties of communications. Meanwhile the king has learned of the incipient revolt and can crush it piecemeal. Duke William had been the real ruler of Normandy, independent, in everything but name, of the King of France. That was true of all the great provincial rulers of France. But William took advantage of the circumstances of his conquest of England to see to it that none of his barons was thus independent of him.

**Oath of Salisbury, 1086.**—This process culminated in what is known as the Oath of Salisbury. To Salisbury William summoned the Witan and every free tenant of the kingdom. The accounts of the exact composition of this great assembly vary in detail, but the significance of what took place there admits of no doubt. Every man present swore to be faithful to the king against every other man. This oath, be it noted, was sworn not only by the king's direct tenants, but by every free land-



holder. Many of the holders of relatively large territories sublet part of their holdings to smaller tenants and part of these latter sublet part of theirs, and so on. But, whatever had been the theory previously, from 1086 onwards it was established that, no matter whether a tenant held directly of the king or whether indirectly through another lord, every tenant was the man of the king before he was the man of his lord. Thus if a baron rebelled against the king, the baron's tenants could not follow him without breaking their oath to the king. The effect of this in checking the power of the barons and in strengthening the central power of the king is too obvious to need emphasizing.

**Result on Local Government.**—There was another, and certainly no less far-reaching, respect in which the scattering of baronial estates strengthened the king. We have seen that in Anglo-Saxon times each lord was the virtual ruler of his own manor where he held a court or courts for the men of his manor. Wherever, under the feudal system, a lord owned a large stretch of territory, the same thing happened on a large scale. As we have seen, in France the great nobles were virtually the rulers of their provinces. But because in England there were no provincial magnates, there was no one who could exercise local governmental powers on a large scale. The result was that the field was left clear for the king himself to become responsible for local government mainly through the shire courts, which we find functioning under their new title of county courts. In principle he did this as his Anglo-Saxon predecessors had done, that is, through his nominee the sheriff, but, as the royal power became more and more real locally, so the power of the sheriff grew.

What all this comes to mean is, briefly, that whereas in Anglo-Saxon England the real government was local



government, in Norman England the government was increasingly centralized under strong kings so that even the local government was mainly delegated central government. The far-reaching effects of this fact will become apparent in several ways, especially in the development of our judicial system, as our story unfolds.

## 2. EFFECTS OF CONTINENTAL FEUDALISM

But though Duke William left behind him, partly deliberately and partly through the fortunate circumstances of his conquest, some of the features of continental feudalism, there were certain other features which he could not leave behind. These concerned chiefly certain ingrained habits of mind which were all the more surely fixed because they were unconscious.

**On Social Status.**—Thus, continental feudalism was far more rigid and definite in its relationships between the ranks of society than was its Anglo-Saxon counterpart. The Normans knew nothing of such minute distinctions between classes as were represented in the Anglo-Saxon villein, bordar, cottar, colibert, and serf. To them there were two classes: lords and villeins. When, therefore, they came to England they simply did not understand the relationships which evidently were a reality to the English. Moreover, this tendency was increased by the gulf separating the poor Saxon peasant from the great Norman noble, a gulf so wide as to make the minor distinctions of status between the peasants themselves appear negligible. The result was that, as the new rulers ignored some of the class distinctions, those distinctions did in fact cease to exist. Those men lowest in the social scale probably gained somewhat in status as a result, but certainly those in the higher grades lost some of their privileges. Many



simple freemen lost their independence and were compelled to hold their land of a lord. Thus, as the relationships of life became simplified, they became more and more sharply defined.

### 3. EVIDENCE OF NATURE OF CHANGE

So far we have been emphasizing from different points of view the fact that the Normans did not introduce a new system but that they modified a system which they found already established. That this is the true view is shown by a number of definite examples of which we select three: the charters of the Norman kings, the "Laws of Henry I", and the evidence of Domesday Book.

**Norman Charters.**—One of the first acts of William I was to confirm the law of the English as it stood under Edward the Confessor. He issued a charter stating: "This I will and order that all shall have and hold the law of King Edward as to lands and all other things with these additions which I have established for the good of the English people." Henry I signalized his accession by a similar charter: "I give you back King Edward's law with those improvements whereby my father improved it by the counsel of his barons."<sup>1</sup> These charters leave entirely vague—may we not say, purposely vague?—what was meant by "King Edward's Law". But the significant fact is that the theory on which the Normans based their rule was, not the abolition of old customs or the introduction of new ones, but the maintenance of the old with modifications.

**Leges Henrici Primi.**—The same idea is expressed in what purported to be "Leges Henrici Primi". This is a book containing a compilation of laws made, pre-

<sup>1</sup> Maitland, *Constitutional History of England*, pp. 7 and 8.  
(E 94)



sumably, by a Norman lawyer in the reign of Henry I (1100–35). What matters for our purpose is that examination shows these “*Leges Henrici Primi*” to consist mainly of Anglo-Saxon edicts or “dooms”. That is to say, here once more is evidence that what was customary in Anglo-Saxon England was continued in only a modified form.

**Domesday Book.**—This idea is also the principle on which the whole Domesday Survey was made (1085–6). That survey was so unique in character and so momentous as a record that at this point something should be said of its general nature.

The Anglo-Saxons had been fortunate in one thing at least: for generations they were free from taxation! The first tax of which we have any record was levied in 991 to raise arms against the Danish invaders—hence called “Danegeld”. This tax was even then not a regular imposition: it was a particular tax for a particular object and was levied only when danger demanded it. In practice, it appears to have been levied about every three or four years between 991 and 1011. King Cnut (1016–35), however, collected it regularly for the support of government, but Edward the Confessor (1042–66) dropped the tax altogether. William the Conqueror was not long in renewing the Danegeld, which, as in Cnut’s time, was made a permanent tax; indeed he trebled the amount of it, thus bringing it to six shillings on every hide (120 acres) of land. Here again we may note in passing an example of an Anglo-Saxon practice continued by the Normans with modifications to bring it up to date. In order that he might know exactly how much he should receive, William planned a great systematic survey of the resources of his realm. He therefore sent commissioners throughout the land to take sworn evidence from the sheriff, the barons, and



the freemen in each hundred, and of the priest, reeve, and six villeins in each village. These were to declare to the commissioners who were the owners of lands in their area and who held in the time of King Edward ("tempore regis Edwardi"); how many plough-teams, mills, fish-ponds, serfs, coliberts, bordars, cottars, and villeins it contained; how much it was worth, and how much it had been worth T. R. E. This information was carried to the royal scribes at Winchester. These selected and arranged the facts county by county, the proprietors of lands in each county being arranged according to rank from the king downwards.

This makes clear that the Norman owners have simply stepped into the holdings of English owners, the holdings themselves remaining unchanged, and that William's main aim was to discover to what extent the value of his possessions varied from that of his predecessors—and all this, be it noted, in order to the efficient collection of an Anglo-Saxon tax.

To quote short extracts from the Domesday giving really adequate examples of the kind of information it sought and how that information was arranged is impossible. The following are given as fairly typical of the Warwickshire survey and are, of course, simple translations of the queer Latin of the original.<sup>1</sup>

#### I.—THE LAND OF THE KING IN FEXHOLE HUNDRET

The king holds Brailes: Earl Edwin held it. There are 46 hides. There is land for 60 plough-teams. In the demesne are 6 and 12 serfs and 3 bondwomen. And there are 100 villeins and 30 boardars with 46 ploughs. There is a mill worth 10 shillings, and 100 acres of meadow. Woodland 3 leagues long and 2 leagues wide. T. R. E. it used to pay 17 pounds and 10 shillings. Now it is worth 55 pounds and 20 loads of salt.

<sup>1</sup> "The Victoria History of the Counties of England: *Warwickshire*", edited Doubleday and Page.



XVI.—THE LAND OF COUNT MEULAN  
IN COLESHELLE (COLESHILL) HUNDRET

The same Count holds in the same vill (Shuttington) 2½ hides, and Godric from him. The same (Godric) held it T. R. E. and was free. There is land for 5 plough-teams. In the demesne is 1, and 2 serfs; and there are 3 villeins and 3 bordars with 1 plough. There is a moiety of a mill paying a rent of 5 shillings, and 8 acres of meadow. Woodland half a league long and 3 furlongs broad. It is worth 30 shillings.

## 4. CURIA REGIS

It is impossible to weigh the evidence, such as this chapter has presented, of the transformation which the Normans effected in Anglo-Saxon feudalism without perceiving that the central feature of that transformation was a strong crown whose power made for unity and for more rigid definition in the relationship of man to man. Probably no single thing reveals this more clearly than does the change which took place in the Witan.

That body, it will be remembered, was the only national Council of Anglo-Saxon England, yet its membership was vague—consisting of a few holders of high office in church and state, together with a number of land-owning warrior nobles—and its functions were indefinite and general.

The corresponding assembly after the Conquest was also vague in its membership and in its power, but it nevertheless underwent certain definite changes. Its very name of Curia Regis, the King's Council, shows that the emphasis has shifted from the character of the members to the person of the king: the Anglo-Saxon assembly was attended by the men who, in theory at least, were the wise men of the land and hence were best fitted to attend; but membership of the Norman Council depended upon the relationship which individuals bore to the king.



**Magnum Concilium.**—The full court of the king was undoubtedly similar to the court of any other lord: it consisted of the king's tenants-in-chief. These included not only the barons but also, as in the Witan, the Archbishops, Bishops, and Abbots. But whereas the church officials sat on the Witan because the holders of such offices might be supposed to be of exactly the type of men best fitted to advise the king, they owed their attendance at the Norman Council to their being landowners and tenants-in-chief. A Council comprising all the tenants-in-chief of the king must have been a numerous assembly, for, as we have seen, the number of men who held land directly of the king was large and included many who held only single knights' fees. This full Council was called the Great Council—*Magnum Concilium*—to distinguish it from a smaller assembly which soon arose, certainly by the reign of Henry I.

**Commune Concilium.**—An assembly so numerous and various in its membership must have been too unwieldy to transact business efficiently; many of its members must have been quite unfitted for the work they were summoned to do; and much routine business, especially in connexion with royal accounts, needed attention, not merely when the Council was sitting but regularly throughout the year. The result was that whereas the full council was summoned three times a year—to Winchester at Easter, to Westminster at Whitsun, and to Gloucester at Christmas—there remained a smaller body of permanent officials in constant attendance upon the king. This was the king's ordinary council, *Commune Concilium*. It consisted of selected individuals from barons and clergy who carried out the regular administrative and secretarial work for the king, its chief official being the Justiciar.



The relationship between these two councils is often vague and uncertain because the chroniclers of the time seem to apply the term "Curia Regis" indiscriminately to both of them. The simplest view, and the one most nearly in accord with the ascertainable facts, seems to be that the Commune Concilium was a small inner committee of the Magnum Concilium, and that it could be called the Curia Regis because it was regarded as in some way representing the larger body.

The Curia Regis thus constituted, that is, using the term to cover both the whole assembly and its permanent, official nucleus, was the only central national assembly of the time and therefore upon it devolved the whole business of government. It issued royal edicts, judged those who broke the edicts, superintended the collection of the king's revenues, kept the royal accounts, did the secretarial work connected with all kinds of royal business, and acted as the general adviser of the king. It is obvious that such a condition of affairs is possible only when national government is in its most primitive condition and when the work is small in quantity. As soon as governmental work expands and becomes complicated, no one body of men can discharge all the functions or be expert in every branch.

**Division of Functions.**—It is easy to see that the effect of the work of William I and his successors was such as to produce this very condition. The sheer strength of the Norman kings must have constituted, from one point of view, their own chief embarrassment. The work of the king must inevitably grow in proportion to his strength. In Anglo-Saxon England most of the functions of government were discharged by local assemblies and the central government was correspondingly relieved. But as the Norman kings drew more



and more of this work into the hands of their own officers, either in the Curia itself or in the counties, the resulting burden was too great to be borne by one set of men.

The result was that the Curia Regis split into separate bodies each with distinct functions. We must beware of imagining that, at the outset, this process was at all deliberate or that the men of the time were even conscious of separate functions of government—legislative, executive, judicial—in the sense that we are. At first, when the Curia met to do business connected with royal accounts, the whole Curia was the king's Exchequer court; when it sat to try offenders, its members were justices, and so on. But gradually this differentiation of functions became more marked: certain members of the Council attended to one branch of the king's business and to nothing else, others specialized in other branches. Just how or when the process began it is impossible to say. The first definite indication of it seems to be the establishment in the reign of Henry I, by certain members of the Council, of an office to deal with all questions of royal revenues. These members acquired the title of "Barons of the Exchequer", their chief business being to receive the dues from the sheriffs at Easter and Michaelmas and from the king's own lands. Their office was not separate from the Council; it was within the Council or, more accurately, the "Barons of the Exchequer" *were* the Council sitting for business connected with money. By the reign of Henry II, that is, by the end of the twelfth century, the Commune Concilium had advanced a long way towards complete division of function. The detailed effects of this process we shall trace in due course as we follow the story of each of our national institutions, especially of the Cabinet, the House of Lords, and the



Judicial System. At this point it will be sufficient to indicate the main lines which those divisions were to follow.


**Branches of Curia.** — There were three main branches of the Commune Concilium.

First, the Exchequer was the king's court for everything relating to revenue.

Second, the Chancellor's department was the clerical section of the king's government, the chancellor himself being the keeper of the Great Seal.

Third, another section of the Council specialized in judicial work: they were the king's judges. Even within this third section there was a further process of more intensive specialization going on. There was the group of judges who always remained at Westminster to try cases between the king's subjects: this became the Court of Common Pleas. A second group always followed the king no matter where he might be in the land: this, because the king was present in person, was to become the Court of King's bench. Yet another group of judges went on circuit round the counties: this was the beginning of a regular system of itinerant justices.

We have thus seen that the Curia Regis was the embryo of all our national institutions, and that gradually this embryonic organism developed and, as it did so, put forth shoots each of which developed functions of its own and became more and more distinct from the others. The Story of the British Constitution is simply the story of that process. We are now to study each of the shoots in turn, to watch its growth, and to see how it functions.





## CHAPTER III

## THE MONARCHY

It is doubly fitting that the more detailed study of our national institutions should begin with the monarchy: partly because of the present position of the King as the head of the state and partly because of the personal influence of the early kings in moulding the other elements of national government.

The position and power of the monarch depend upon the sources whence his authority is derived and upon his relationship to that source; or, to express the same thing in simpler terms, his position and power depend upon the answer to the question: "Who makes him King and upon what terms?" Consequently, the story of the monarchy in England is really very little more than the story of the gradual successive changes in the principles governing the appointment of a particular individual to the throne. That story has three stages: election, hereditary right, and Act of Parliament.<sup>1</sup>

## I. ELECTION

**By Witan.**—Our survey of the English constitution before the Norman Conquest has shown us already how the kingship arose. We saw that, as time passed, one family came to be regarded as the ruling family and from that family the Witan chose the most suitable member to fill the vacant throne. It is true that the Witan had nothing like what we should call a constitutional right to select the sovereign, for the Witan could not claim, and did not claim, to represent the

<sup>1</sup> For this order of treatment I am particularly indebted to D. J. Medley's *English Constitutional History*, pp. 73 ff.



whole people. Their voice was merely the acclamation by the great men, mainly the great warriors, of the man with outstanding claims to lead and rule. There can be no doubt, however, that their choice was not a mere formal ceremony but was a real election. This is proved by their sometimes electing a man who had no hereditary claim at all. Thus, on the death of Edward the Confessor, the Witan chose Harold, son of Earl Godwin, to be King though male members of the royal house were still living.

**After Conquest.**—In principle, this choice of the King by election continued after the Conquest. The Norman Kings were elected by the Great Council, and, in return for the election, each King issued a charter promising to maintain the laws established and to grant certain necessary reforms.

There can be no mistaking the significance of these charters. The Kingship was, in effect, settled by a bargain: the candidate recognized the possibility of the barons' choosing someone else, so, in order to secure his own election, he made a formal promise of benefits to be conferred if he were successful. It is, of course, easily possible to exaggerate this aspect of the matter, and very much must have depended upon the character of the individual concerned and upon the particular circumstances of the time. But there can be no doubt about the principle involved: the King was elected. That the question of strict hereditary right to the throne was not by any means the dominating factor in the issue is indicated by such an incident as occurred on the death of Henry I (1135): the London citizens, who strongly supported Stephen, claimed that they had the right to choose the monarch. True, they would have found some difficulty in substantiating such an assertion; but the very fact that they could put it forward seriously



shows that, in the minds of the people at large, no man had any right to the throne unless he were chosen by someone.

## 2. HEREDITARY RIGHT

The next half-century was, however, to see a marked change in the appointment of a King, and by the end of the twelfth century the election ceremony had become little more than a formal acknowledgment of the claimant who had an undoubted hereditary right to the throne.

Historical proofs of this change abound: we will select four of the earliest. Richard I (1189) was the first King who did not issue a charter on his accession. His example was followed by John (1199). Thus by the end of the twelfth century the idea of a covenant between the King and the nation was dying if not dead. The next century shows this process much more definitely. Henry III was a mere child when John died (1216), and it is fairly safe to say that a century earlier he would not have been accepted as a suitable King, yet there never was any doubt as to his accession. An even clearer illustration occurred on the death of Henry III (1272). His eldest son, Prince Edward, was abroad on Crusade at the time, but an assembly of nobles and representatives of the other estates of the realm met at Westminster and swore to be faithful to him. Edward proceeded leisurely and did not return home until 1274. He had thus virtually reigned as King for two years before being actually crowned. Nothing could illustrate more clearly that the title to the throne had ceased to be election and had become hereditary right.

Examination of the history of other primitive peoples and states suggests that this process would probably have taken place ultimately in any circumstances, but in England the tendency was certainly strengthened and



accelerated by the conditions of succession prevailing under the feudal system generally. For, during the eleventh to thirteenth centuries, the most notable movement was the feudalization—if the term be permitted—of almost every department of life. This affected, amongst other things, the order of succession to the throne. On the death of any feudal lord, of whatever rank, his vassals did homage to the man who succeeded him by hereditary right. In the eyes of feudalism, the King was simply the greatest landowner, the owner of all the land. As, therefore, this feudal rule of land-succession became more and more rigid, it was natural to apply the same principle of succession to the supreme feudal lord. The result was that instead of the crown's being conferred upon a King because he was personally the fittest man for the post, it descended, as did any other territorial authority, to the hereditary claimant irrespective of his personal fitness for the duties of his office.

### 3. ACT OF PARLIAMENT

**Decline of Feudalism.**—Before feudalism in England had attained finality as a system, its decay had already begun. Many factors contributed to this end.

**a. New Warfare.**—New methods of warfare produced by the Hundred Years' War and depending upon the combination of infantry and archers, greatly reduced the fighting value of the mounted knights who had formed the most important element of the feudal armies. The introduction and increasing use of gunpowder in the fourteenth to the sixteenth centuries carried this effect still farther. Against such a weapon the feudal horseman was powerless, tactics and discipline became more efficient than the imposing display of mounted nobles, and so the King relied less and less upon his



feudal army and more and more upon regular soldiers who, being paid by the King, were much more completely obedient to him than the barons had been. This was really only the culmination of a process begun as far back as 1159. In that year Henry II had introduced a system called "scutage" by which a baron paid the King money, in amounts varying according to the number of knights' fees he held, to "shield" him from military service. It is easy to see the advantages to the King of the barons' becoming unaccustomed to warfare. The use of gunpowder and heavy artillery gave the King the further advantage that his vassals would not be able to afford weapons or ammunition powerful enough to enable them to rebel effectively or even to defend their castles which had been their chief assurance of security.

**b. Money and Trade.**—The mention of scutage illustrates another factor in the decline of feudalism, namely, the substitution of money as the basis of relationship between individuals, more especially between lord and villein, in place of land and services. Hence, since such expression of relationships in terms of land was the very essence of feudalism, the increasingly widespread use of money implied ultimately the end of feudalism. This process was hastened by the increase of trade and manufactures, especially in wool, in which money was the only possible means of exchange and which produced a middle class, mainly of burgesses, unfettered by feudal ties.

**Growth of Parliament.**—Side by side with this decline of feudalism there was proceeding another national movement, namely, the growth of Parliament. That story we shall trace in detail later on; here it is sufficient to note that the development of Parliamentary power was the most significant political feature of the



fourteenth and succeeding centuries. This inevitably affected the title to the throne. Just as when England was governed by feudal principles the throne itself descended according to feudal rule, so as Parliament became supreme the throne descended according to Parliamentary rule. In other words, succession to the throne was fixed by Act of Parliament. This is in effect—for the method still obtains—a revival of the old principle of election. It is true that ordinarily Parliament chooses the individual who would succeed by hereditary right; but it is equally true that more than once Parliament has deliberately gone outside the direct line of succession, and that, if circumstances seemed to make it desirable, it would be acting constitutionally in doing so again. The powers of Parliament exercised to fix the succession to the throne are illustrated by the following selected examples.

**Henry VIII.**—Three times during the reign of Henry VIII Parliament altered the succession. First, his marriage with Katherine of Aragon was declared void and that with Anne Boleyn valid, and the throne was consequently to descend to the children of Anne Boleyn; later both these marriages were annulled and the crown was settled instead on the children of Jane Seymour; later still, Katherine's daughter Mary and also Anne's daughter Elizabeth were both declared legitimate and their succession provided for. In addition, both the second and the third of these acts empowered Henry, in the event of failure of heirs of his own body, to leave the throne to anyone he pleased, whether a member of his house or not. It is true that Parliament did all this in accordance with the wish of the King, but it is also most notably true that the King obtained his will through Parliament and that the title to the throne was fixed by Act of Parliament.



**Bill of Rights.**—At the Revolution of 1688 the same principle was reaffirmed, the issue being defined with unmistakable clearness because the succession was broken and Parliament settled the crown upon a new line. The Bill of Rights (1689) declared William and Mary to be King and Queen, and settled the succession on their children, then on Mary's sister Anne and her children, then on any children of William by another wife, always provided that no Roman Catholic could ascend the throne. That James II and his little son were alive at the time of the passing of this measure demonstrates how definitely title by hereditary right had been replaced by title by Act of Parliament.

**Act of Settlement.**—This was confirmed in 1701. Mary had died (1694) without children, and all the children of Anne had died. To avoid a disputed succession, Parliament wisely decided to settle the question before it actually arose. Accordingly the succession was fixed upon the nearest Protestant Stuart, namely, the daughter of Elizabeth (daughter of James I) and the Elector Palatine—"the most excellent Princess Sophia, and the heirs of her body being Protestants". This brought the Hanoverians to England, in the person of George I (1714), and hence is the legal basis for the reign of the present royal house.

#### 4. ROYAL PREROGATIVES

We were led into this study of the principles governing the appointment of an individual to the throne by the statement that the position and power of the monarch depend upon the source whence his authority is derived. We now see that source to be Parliament, and it therefore follows that the power of the sovereign is limited by Parliament. This certainly does not mean that the



monarch is completely subservient to Parliament: it does mean that his powers operate through, or along lines approved by, Parliament. This is what is meant by a Constitutional Monarch: one who rules according to the rules and customs of the Constitution.

**Powers Indefinite.**—When we proceed to examine more exactly the powers of the sovereign and how those powers function, we meet difficulties. To begin with, no one can know what is the precise relationship between the monarch and his ministers except those ministers themselves. Further, the desirability of making such knowledge common is at least extremely doubtful; for the effectiveness of the royal power depends very largely upon the indefiniteness of the extent of that power and of the methods of its operation. Moreover, whether theoretically desirable or not, such revelations are in practice almost impossible, the reason being that the personal relationship between a monarch and his ministers must depend very considerably upon the respective personalities and experiences of each and upon the particular circumstances under discussion. Thus, a young monarch at the beginning of his reign would naturally tend to be influenced in a crisis by the counsel of a wise Prime Minister of long experience. Conversely, a Prime Minister new to office would rightly give much weight to suggestions proffered by a monarch who had had a long reign and so had much experience of similar crises and of several ministries. Gladstone, who had an almost unique opportunity for forming a judgment and who certainly was not the favourite of his monarch, summarized the matter thus: “The Sovereign, as compared with her Ministers, has, because she is the Sovereign, the advantages of long experience, wide survey, elevated position, and entire disconnexion from the bias of party.”<sup>1</sup>

<sup>1</sup> Gladstone, *Gleanings of Past Years*, I, p. 42.



There are, however, a number of clearly-defined powers, termed Prerogatives, which the sovereign possesses. The chief of these are connected with his relationship to Parliament and ministers.

**Chooses Premier.**—The King has the undoubted right to choose the Prime Minister. As a rule the individual on whom the choice will fall is determined by the state of the political parties: in practice the man selected is the leader of the party commanding a majority in the House of Commons. But the King certainly has the right to use his discretionary power. It is not difficult to see that in a political crisis it would be of the highest importance that such a power should exist and that it should be in the hands of an individual with no suspicion of party bias.

**Dissolution.**—To some extent the King's power of summoning a Parliament is limited by statute. Apart from specific Acts governing the meetings of Parliament, the mere necessity of Parliamentary grants of money for maintaining state services is a sufficient guarantee of regular Parliamentary sittings. But the King still retains the right to dissolve Parliament and to refuse to dissolve it. Thus in the event of the parties in the House of Commons being so evenly divided—as actually happened in December, 1923—that no one party had a majority over the rest of the House, the Prime Minister, or the man invited by the King to become Prime Minister, might, if he thought his party stood to gain by so doing, advise a dissolution. In such circumstances the King would be constitutionally entitled to refuse to dissolve Parliament, his decision doubtless being influenced by the length of time that had elapsed since the previous general election. On the other hand, if the leaders of the majority in the Commons were, for any reason, unwilling to form a ministry, the King



would have the right to dissolve Parliament in order that the country might express its verdict.

**Creation of Peers.**—A further means by which the King can exert his influence to ensure the government of the nation in times of political emergency is by the use of his power to create peers. Two striking and well-known instances illustrate this prerogative.

In 1830 a Whig ministry under Lord Grey was returned to power pledged to carry through a measure of Parliamentary reform. Three Reform Bills were successively presented. The first was defeated in Committee by the Commons; the second, introduced after another general election had given the Whigs a greatly increased majority, was rejected by the Lords; the third was amended by the Lords to the point of mutilation. Lord Grey, confident of the support of the country, refused to carry on a government unless the permanent Tory majority in the Upper House was controlled, and he obtained a promise from the King that enough Whig peers would be created to achieve this purpose. The promise was couched in these terms: "The King grants permission to Earl Grey and to his Chancellor, Lord Brougham, to create such a number of peers as will be sufficient to ensure the passing of the Reform Bill, first calling up peers' eldest sons." To save their House from being flooded by new peers the Lords thereupon gave way.

In 1911 a situation similar in principle to that of 1830 arose. In 1906 the Liberal party was returned to power with an overwhelming majority. That ministry introduced a number of large measures of legislation; some of the chief were rejected by the House of Lords, most notably the Budget of 1909. Two elections in 1910 resulted in returning almost identical government majorities which, though considerably



smaller than that of 1906, were amply sufficient to pass the Budget again. This time it was passed also by the House of Lords. The Government then introduced a Bill, known as the Parliament Bill, to limit the powers of the Upper House so as to prevent the recurrence of such a deadlock. With the terms of the Parliament Act we shall deal later. What concerns us now is that after the House of Lords had made amendments which the House of Commons refused to accept, the Prime Minister obtained from the King an undertaking that sufficient peers would be created to pass the Bill, this course of action being based directly on that of 1832. Once more the House of Lords gave way and passed the measure.

These, then, are the outstanding prerogatives of the Crown: the power to choose the Prime Minister, to decide upon the dissolution of Parliament, and to create peers. It is clear from their very nature that these are reserve discretionary powers whose effectiveness depends upon their being used as rarely as possible. There are, however, numerous others. Some, such as the right to declare war and peace, operate in extraordinary circumstances only. Some, such as the powers of appointing to the chief offices of state, are in constant and ordinary use. One of these calls for special mention, namely, the right of the King to be kept constantly informed of, and to be consulted on, all matters of state policy. This is not a merely nominal right of the sovereign: the reign of Queen Victoria affords a number of illustrations that the Queen took care to know what was being done by her ministers. If she disagreed with them she expressed her view, but if after this the minister in question adhered to his opinion she withdrew her opposition. There can be no doubt that not infrequently the Queen's disagreement caused ministers to see the



wisdom of the suggestions she made and to reshape their proposals accordingly. It is too early yet to write of later reigns, but there is nothing to show that Queen Victoria's practice has been modified subsequently.

In the use of all these prerogatives the King is guided by the advice of his ministers who are responsible to Parliament for his official actions. This is the explanation of the maxim: "The King can do no wrong", about which more will be said in the next chapter.

## 5. ADVANTAGES OF THE HEREDITARY MONARCHY

It remains now to consider the value of the hereditary principle in the monarchy. To obtain the correct perspective we must regard that principle as it affects the functions of the monarch. Appointment according to hereditary descent might not be relied upon to produce the most efficient head of a state department or of a great business house. But for the position and work of the sovereign, especially of this country, the method has distinct advantages.

**Stability.**—First, in a society governed, as modern societies are, through popularly elected representatives who change more or less with the changing political views of the nation, it is extremely valuable to have an unchanging element in the state, particularly at the head of the state. Amid ever-varying politics and parties, the sovereign stands as a visible expression of the continuity of the life of the nation: the sovereign represents the permanent essential features of the nation—he represents the *nation*—as distinct from its outward ephemeral expressions.

**Impartial.**—This detachment of the monarch from



political parties has the further advantage of giving him a position of strict impartiality. This can very rarely be the case with a President who, almost invariably, is the nominee of, or at least has been a prominent leader of, one or other of the political factions of the state. In times of crisis, when the slightest suspicion of partisanship on the part of the head of the state would be disastrous, the superiority of a hereditary monarchy has been demonstrated repeatedly.

**Popular Sentiment.**—It may be true that much of the power of the King is derived from popular sentiment, which would not bear a very minute logical examination. It may be true that the position enjoyed by the monarch depends largely upon a glamour with which custom surrounds him. But certainly it is all to the good that popular sentiment should be influenced in a direction making for the stability of the nation rather than in a disruptive sense.

**Empire.**—As a unifying force on the Empire the effect of the monarchy is undeniable, and is such as could never be exerted by any other than an hereditary sovereign. No matter on what other principle the head of the state were appointed, not only could he never represent more than one section of the English people, but it is difficult, if not impossible, to see how he could represent the Empire at all. The King represents the whole Empire as well as the Motherland. This imperial position of the sovereign is a factor whose influence cannot be exaggerated in any consideration of the future position of both the monarchy and the Empire. From this point of view the Empire cruises of the heir to the throne have a value far beyond that of the immediate enthusiasm they evoke.

The question of which is theoretically the ideal system of appointing a sovereign—by the hereditary principle



or by some form of election—is probably unanswerable in direct or simple terms, and, in any case, is not a very profitable kind of inquiry. Which is the better form—hereditary or presidential—must depend largely upon tradition and local circumstances. For example, a newly formed state, working out its constitution from the beginning, might hesitate before establishing a hereditary monarchy in the absence of the historical tradition necessary to support it. But in England the monarchy is the natural expression of the history of our people for a thousand years, and, whatever the future may bring, the hereditary principle has, with rare and notable exceptions, worked with eminent success in the past. Even a little insight into the history of the last hundred years shows that the monarchy has justified its existence on many occasions critical for the nation. To-day the monarchy is probably more firmly established in the hearts of the people, as well as in the institutions of the state, than at any other period since Elizabeth.

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## CHAPTER IV

### THE CABINET

The Cabinet is the centre of the British Constitution, so that our Government is often truly described as Cabinet Government. The Cabinet is, indeed, the characteristic of our constitution which distinguishes it from other forms of constitution to be found in certain other countries: thus we speak of Cabinet Government as distinct from Presidential Government. Yet, pivotal as the Cabinet is in our political and governmental system, its existence has never been recognized by



English law though the Cabinet is responsible, directly or indirectly, for every law placed upon the statute book. Later in our study of the Cabinet we shall have to note one respect in which the anomalous, unofficial status of that body has been indirectly modified to some slight degree in recent years owing to the situation created by the Great War (1914-9). But the general truth of the statement remains: the Cabinet has never been recognized in set terms by English law.

**Definition.**—Perhaps we had better begin by defining the Cabinet as a committee of the holders of the chief offices of state, who are members of Parliament and responsible to Parliament for everything they do by virtue of their office, who all belong to the party commanding a majority in the House of Commons and who are presided over by the Prime Minister. We shall have to qualify the details of one or two of these terms as we proceed, but this rough definition will afford a sufficiently safe basis for our survey.

The definition contains three factors, namely, the control of ministers by Parliament, the existence of political parties, and the position of the Prime Minister. The origin and development of each of these must therefore be an inherent part of any account of the Cabinet. Before dealing with them we must first investigate the origin of the Cabinet itself.

## 1. ORIGIN OF CABINET

**Privy Council.**—In our study of the development of the Curia Regis, whence all the branches of our governmental system took their source, we reached the point at which the name "Curia Regis" was applied sometimes to the Magnum Concilium, which might include all the King's tenants-in-chief, and sometimes



to the Commune Concilium, which was a small committee of the larger body. In the course of time the Commune Concilium underwent a process exactly analogous to that which the Magnum Concilium had undergone: that is to say, it grew too large efficiently to discharge its functions. In consequence, the King gradually relied upon the advice of a few of its outstanding members, these being especially the holders of the chief offices. The growth of Parliament during the thirteenth and fourteenth centuries increased rather than decreased the King's need for permanent advisers. Under Edward III (1341) an Act of Parliament arranged for the election of five lords who, with the chief officers of state, being members of the Council, were to carry out certain judicial functions. This body of definitely named officials ultimately acquired legislative, administrative, and judicial powers much wider than those originally delegated to it. Records of its proceedings began in the reign of Richard II (1377-99), by the end of whose reign it was an organized body of officials and advisers; and by the reign of Henry VI (1422-61) it was officially recognized and designated as the Privy Council. Later, under the Tudors, so intimate was the relationship between the Privy Council and the King that every act of the King had to be performed through some member of the Privy Council, and that member affixed a royal seal, pertaining to the particular office concerned, and so could be held responsible for the act. Thus Privy Councillors became the responsible advisers of the King.

**Decline of Privy Council.**—We shall have to refer from time to time to the later history of the Privy Council, but at the present point in our study it suffices to say that most of its powers have been either abolished altogether or transferred to some other authority. Its



legislative powers have been annulled by Act of Parliament: thus the 1539 Act giving to Henry VIII power to issue, with the advice of his Council, proclamations having the force of law, was repealed in 1547 under Edward VI. Some of its judicial powers were abolished with the Star Chamber,<sup>1</sup> while others have been delegated to a special committee called the "Judicial Committee of the Privy Council". Its advisory functions have devolved upon the Cabinet—which is our present concern.

Just as the Privy Council was originally a Committee of the Curia Regis and gradually acquired powers other than those belonging to the parent body, so the Cabinet began as an inner group of the Privy Council and in turn developed functions peculiar to itself. This definitely began in the reign of Charles II. At the Restoration, Clarendon became Chancellor and, to secure greater governmental efficiency, he proposed that the numerically unwieldy Privy Council should be divided into four committees each of which should deal with one section of national administration. This scheme met with a curious fate: the committee of foreign affairs, consisting of Clarendon himself and five others, usurped the functions of the whole Council. That is to say, the full Privy Council was consulted on formal occasions only; while Clarendon's committee formed a knot of ministers on whose advice the King regularly relied. They met usually in the King's private study or "cabinet", and this fact gave to the committee its name.

**Features of Cabinet.**—We do well to note at this point that, judged by the definition at the beginning of this chapter, in no single respect could Clarendon's committee be truly called a Cabinet in the modern

<sup>1</sup> See below, Chapter VIII, pp. 129-31.



sense: the members were chosen by the King; the King himself presided at their meetings; and they did not all belong to any one political party for the sufficient reason that political parties did not yet exist. The Cabinet of to-day is the direct outcome of the "Cabinet" of Charles II, but it should be clear that, in the meantime, three features have to be evolved, namely, Parliamentary control of ministers, political parties, and the Prime Minister. We have now to deal with each of these in turn.

## 2. PARLIAMENTARY CONTROL OF MINISTERS

The question of the control of ministers was one of the vital issues fought out in the Civil War of the seventeenth century. Previous to that date, the ministers of state had been chosen by the King; they were his advisers and he could consult with whom he would and could dismiss whom he would from court. This system had much to recommend it when the throne was occupied by a monarch with the best interests of the country at heart, and who therefore chose sound councillors as, for example, Elizabeth with Cecil and Walsingham. But when under James I and, even more, under Charles I the royal favourites were mere worthless self-seekers, Parliament grew restless. The impeachment of Lord Chancellor Bacon, largely at the instigation of Prince Charles and his friend Buckingham, was a sign of the times. King James was right when he predicted to them that the time would come when they would have their "bellyful of impeachments". For Buckingham himself was impeached on account of the failure of the Cadiz expedition. Charles I defined the issue exactly when he exclaimed: "I would not have the House to question my servants, much less one who is so near to



me." Buckingham's case was never brought to an issue: the King dissolved Parliament to save the minister, and Buckingham was murdered before the attack could be effectively reopened.

**Wentworth.**—There was no doubt, however, about the Wentworth case. Fear of failure caused the Commons to drop his impeachment and substitute a Bill of Attainder. But Charles was compelled to sign the Bill for the execution of his own minister. Parliament had asserted with success that, though ministers of state might be the King's servants, they were not beyond Parliamentary control.

The Grand Remonstrance, passed by the House of Commons in November, 1641, stated the view of the Parliamentarians unmistakably: it petitioned the King "to employ such . . . ministers, in managing his business at home and abroad, as Parliament may have cause to confide in".

**Danby.**—The issue was carried a notable step farther by the attack on Danby. By the express command of Charles II, Danby had negotiated with Louis XIV for supplies of money. Parliament, discovering the negotiations, impeached Danby (1679). The latter's plea that he was but executing the written order of the King was disallowed. Such an ignoring by the Commons of the King's order was tantamount to claiming that ministers were responsible not to the King but to Parliament.

After the Revolution of 1688, the principle of responsibility of ministers to Parliament was never really in doubt. Certainly there could be no doubt after the Act of Settlement (1701), which enacted, among other clauses, that, after the decease of Queen Anne, resolutions of the Privy Council should be signed by members responsible for them, and that a royal pardon should



not be pleadable to an impeachment. The House would thus be able definitely to fix responsibility for every act of the King, and to bring to justice the minister through whom any offending royal act was performed. In effect, this must mean that the Sovereign himself can never be held responsible for any official act performed by him or in his name. Hence the dictum: "The King can do no wrong."

The principle, thus established and recognized, of Parliamentary control of ministers was one of the very greatest results of the Civil War. But, all the same, the power this gave to Parliament was mainly negative: Parliament could destroy a royal minister of whom it disapproved but it could not secure the appointment as a minister of any particular individual it desired. The acquiring, in practice if not in theory, of this latter power was the result of the second of the three features necessary to the evolution of the Cabinet, namely, the growth of political parties.

### 3. GROWTH OF POLITICAL PARTIES

The very structure of the House of Commons demonstrates clearly that the House was designed on the assumption that its members would be divided into two rival parties: the floor of the House is divided into two opposing tiers of benches, that on the right of the Speaker being occupied by the Ministerial party and that on the left by the Opposition. There is no logical reason for this sharp division, and, indeed, most representative assemblies are housed in buildings with seats on the plan of an amphitheatre. The assumption in these clearly is that the views held by the members respecting the various questions debated will not be sharply divided into two flatly contrary camps, but will



merge gradually into one another. This is surely the more reasonable assumption; but in this, as in so many other respects, the British Constitution is not the result of abstract reason but of the practical solution of a practical problem.

**Origin of Parties.**—The opinions of historians as to the point at which the party system may be said to begin differ considerably. The facts, simply stated, appear to be as follows.

The struggle with the early Stuarts, culminating in the Civil War, did a great deal to cleave the nation into two clearly defined sections, one supporting the King and one opposing him. The policy of the later Stuarts only confirmed this cleavage. After Clarendon's fall in 1667, to which reference was made above, Charles II had no one chief minister until the rise of Danby in 1673. The interval was bridged over by a group of five ministers—Clifford, Arlington, Buckingham, Ashley, Lauderdale—known as the Cabal. The original meaning of the word "cabal" is "a private meeting"; but, because the word is inseparably associated with this particular, ill-famed Cabal, through the initials of the members' names happening to form that word, since that time the word has always meant a secret intriguing body. What matters for our purpose is that in 1673, to counteract Charles's Declaration of Indulgence, granting freedom of worship to Roman Catholics and to Protestant Dissenters, the Commons passed the Test Act which excluded from office all who refused to take the Sacrament according to the rites of the Church of England. Thereupon Clifford and Arlington, both of whom were Roman Catholics, were compelled to resign. Charles then dismissed Ashley, better known as the Earl of Shaftesbury, who had become increasingly suspicious of the Roman Catholicism of the court, and hence the Cabal broke up.



**Whigs and Tories.**—Shaftesbury, however, set about retrieving his power. This he did by deliberately organizing a party which should oppose the Crown consistently in all its undertakings whether these were intrinsically good or bad. This was the origin of the Whig party. Inevitably the King's supporters created a rival organization which became known as the Tories. These were mere nicknames derived, like all nicknames, from not very important contemporary events, and their source need not concern us. What is of the utmost importance, as a guide to subsequent history, is that the Whigs aimed at limiting the power of the King which the Tories upheld.

**Revolution, 1688.**—Charles II was astute enough to know when and how to strike. In 1681 he was so completely the master of the political situation that Shaftesbury had to flee to Holland where he died two years later. For the time the Whigs were crushed, but only for the time. The crude absolutism of James II (1685–8) rallied the bulk of the nation to the Whig cause, and when, finally, an invitation was sent to William to become King it was the Whigs who sent it. The almost inevitable result was a great impetus to the party system. For, although at first William tried to form a ministry from the leaders of both parties, he soon found that by so doing he was making bitter enemies of all and steadfast friends of none, and hence was compelled ultimately to rely on the Whigs alone.

In principle, therefore, the political position was similar to that of to-day. One party alone held the offices of state and the other party consistently opposed them in the hope of some day taking their places.

The Whigs were willing to support any monarch who governed according to the rules of the constitution, that is, a constitutional monarch. Hence throughout the



reigns of William III, Anne, George I, and George II (1688-1760) they held sway with only a very few short breaks. George III ushered in a new régime. He sought consistently to live out the maxim, "George, be a King", which his mother instilled into him, and to restore the personal rule of the King. The Whigs, regarding this as unconstitutional, ceased to support him and the Tories at last returned to power.

Thus, one of the outstanding results of the 1688 Revolution was the establishment, as a permanent feature in our Constitution, of a definite two-party system, such that all the ministers of state at any one time are chosen from one or other, but not from both, of the parties.

In the meantime, that is before the reign of George III, another development had taken place and had brought about the third of the three features in the evolution of the Cabinet, namely, the rise of a Prime Minister.

#### 4. PRIME MINISTER

We have traced how the ministers of state ceased to be the King's ministers, in the sense of being chosen by him and responsible to him alone, and became rather Parliament's ministers because, though Parliament did not directly select particular men for particular offices, the ministers were all drawn from the party commanding a majority in the Commons. How one of these became the "Prime Minister" is one of the most curious stories in our history.

The Prime Minister of the present day is the man chosen by the King from the party in power to appoint men to those government posts, both greater and less, which are vacated at each change of ministry. The occupants of the most important of these posts form



the Cabinet over the meetings of which the Prime Minister presides. Previous to the eighteenth century no such Prime Minister existed: the King chose his own ministers, consulted with whom he would (whether ministers or not), was responsible for his own policy, and presided over all meetings of his ministers.

**George I and George II.**—The change was due to the coming of the Hanoverians. George I could not speak English at all and George II could speak it with only the greatest difficulty. Moreover, neither of them was really versed in the intricacies of English politics. Their presence at a Cabinet meeting could never be other than boredom to the King himself and a hindrance to the business of the Cabinet. As a consequence they, not unwisely, stayed away from Cabinet meetings. But someone had to preside, a duty which naturally fell to one of the ministers present. This minister then reported to the sovereign the decisions taken by the Cabinet. The change in constitutional practice thus involved, though mainly a change of emphasis, was nevertheless a very real one. Increasingly the initiative in national policy passed out of the hands of the King into those of the ministry.

**Walpole.**—A practice which was the outcome of a personal and temporary circumstance, namely the inability of the King to speak English, might be expected to lapse with the passing of the circumstance. That this did not happen was due in large measure to the man who happened first to fill the office of Prime Minister. Sir Robert Walpole was the leader of the Whigs, and, through his conspicuous ability and management, he remained in power for the remarkably long period of twenty-one years (1721–42). The result was that what began as an experiment ended as a tradition. A short period of premiership might have ruined any



chance of the permanent establishment of Cabinet Government and have led to England's reverting to personal monarchy such as survived in European countries. But the mere length of Walpole's régime established so firmly the custom of the predominance of one minister that his successor followed his precedent. Though George III tried to regain, and in some respects did regain, the personal power of the King, even he had to bow to exclusion from Cabinet meetings.

Much was to happen before all the customs associated with the constitution and working of the modern Cabinet system had developed and hardened into the rules of to-day. Still it is fair to say that, except in name—for Walpole himself repudiated sharply the charge of being a "first minister"—Walpole was the first Prime Minister. Though he did not always himself choose his colleagues, he certainly ejected from the ministry those who differed from him, such as Pulteney and Townshend; he was the leader of the Whigs, who had the majority in the House of Commons; and he presided at Cabinet meetings.

## 5. OFFICES OF STATE

Reference has been made to the Cabinet's consisting of the holders of the chief offices of state. Our survey, therefore, would be incomplete without some account of at least the most important of those offices. To describe exhaustively the historical development and the present working of each one is beside our present purpose. Moreover, the functions of some, as, for example, the Post Office and the Mines Department, are sufficiently indicated by their names.

**Justiciar.**—In the early days of the Norman period, when the King personally either discharged or supervised the active work of the state, there was only one



great officer of state, namely the Justiciar. Consequently he had some influence in every sphere of government, which, as we have seen, was not thought of as being divided into separate, sharply divided sections. The Justiciar stood next to the King, and, in the absence of the King, was his viceroy. As such, he overshadowed what other officers of state there were.

**Chancellor.**—There was, for example, the Chancellor, who was really the head of the King's clerical department and himself was at first merely a kind of chief clerk. By the reign of Henry III (1216–72) the Justiciarship fell into desuetude and the Chancellor then stood next to the King. Gradually, however, his position was greatly modified by the emergence of another officer.

**Treasurer.**—One of the first branches of government to be differentiated from the general mass of governmental work was naturally that connected with the royal finance. Just as to-day the Treasury is the pivot of government because it raises and controls the money necessary for the other departments of state, so the origin of the office was natural and inevitable, its work being given a marked impetus as money became increasingly important in the economy of England in general and of the King's government in particular. We may therefore expect to find the Treasurer growing steadily in importance: this, in fact, is exactly what happened between the Conquest and the Tudors.

By the early seventeenth century the financial work had grown to such an extent that the office was put into commission, that is, a board of several people was appointed to do between them the work of the Treasurer, these being known as "The Lords Commissioners for executing the Office of Lord High Treasurer". This practice has usually been followed since that time, the



Board consisting of five members: the First Lord of the Treasury, three Junior Lords, and the Chancellor of the Exchequer. So far as the actual work of the Treasury is concerned, the first four offices are now merely nominal: the Prime Minister usually takes the office of First Lord of the Treasury, while, as we shall see in dealing with the organization of the House of Commons, the three Junior Lords are really the government whips. The actual work is done by the Chancellor—hence the modification of his office referred to above.

The functions of the Treasury are twofold. First, it has to provide the money necessary for the work of the other departments of state, and hence it has to pass the estimates, prepared by the separate departments, of what their needs will be. This money is raised mainly by the annual vote in Parliament, but also by government loans, the arrangements for which are one of the duties of the Treasury. Second, the Treasury controls—or at least supervises—the expenditure of the other departments.

**Secretaries of State.**—The first definite mention of a secretary occurred during the reign of Henry III. The office was then in no sense political, but was simply a minor position in the royal household. The close attachment of the holder of the office to the King's person gave him every opportunity of improving his status, and, as time proceeded, the Secretary became a personage of increasing importance. In the middle of the fifteenth century he was made responsible for the use of the royal signet, and under the Tudors he steadily gained political importance so that the office was conferred on men of rank and distinction.

In 1433 a second Secretary was added to deal with the King's affairs in France. This must not be taken to



indicate a permanent division of functions, as between the two Secretaries, into "home affairs" and "foreign affairs"; indeed the precedent of having two Secretaries was not by any means uniformly followed. In the succeeding centuries there were various arrangements and rearrangements of work between them. Only in 1782 was the work of the Secretaryships definitely re-organized, their respective functions being indicated by the titles of Home Secretary and Foreign Secretary.

In 1794, during the Revolutionary War, a third Secretary was added—the Secretary for War—who also usually was responsible for the colonies. At the outbreak of the Crimean War in 1854, the War Minister was so overcrowded with work that a separate Colonial Secretary was appointed. After the Indian Mutiny (1858), when India was brought directly under the British Government, a Secretary for India became necessary. The development of aerial warfare during the Great War of 1914–9 was such that all the relevant work was gathered to one department presided over by the Secretary of State for Air (1917). Finally, a Secretaryship for Scotland was added in 1926. The Secretaryships of State thus stand at seven.<sup>1</sup>

It should be understood that, in the eyes of the law, these seven form only the one original office. Thus, Acts of Parliament refer to a Secretary of State so that legally any of these seven Principal Secretaries could exercise any of the powers conferred, whether they concern what is normally dealt with by his office or not. The Home Secretary remains the first of the Secretaries of State, a position to which he is entitled historically, the other Secretaryships being offshoots from his. The duties and powers of his office are multifarious: their

<sup>1</sup> Eight, if we reckon the Secretary for the Dominions separately: see below, Chapter X, "Dominions Office".



range is perhaps sufficiently indicated by the fact that he is responsible for functions as various as the administration of justice, including the control of the Metropolitan police, and also of the Factory Acts.

**Departments of State.**—What has been said about putting the office of Lord High Treasurer into commission, applies, in principle at least, to other departments of State; that is to say, the work of the offices in question is discharged not by one man but by several men, such a committee being usually called a "Board". This is true of the Admiralty, the Board of Trade, the Board of Education, and of the Ministries of Health and of Agriculture and Fisheries.

**Admiralty.**—The Admiralty is controlled by the Lords of the Admiralty. Of these the First Lord is a Cabinet minister responsible to Parliament for his department. He is assisted by four Naval Lords, each concerned with a definite section of the work of the Board, such as the construction and equipment of ships, personnel, &c.

**Board of Trade.**—The Board of Trade has had a long and varied history going back as far as the reign of Charles II. Its business is with everything relating to trade and commerce, including trade marks, coast-guards, and the regulation of joint stock companies. The Board itself consists of its President, together with the First Lord of the Treasury, the Secretaries of State, the Chancellor of the Exchequer, the Archbishop of Canterbury, and the Speaker of the House of Commons.

**Board of Education.**—The Board of Education was created in 1899, and, like the Board of Trade, consists of a number of Cabinet Ministers under a President.

**Ministry of Health.**—One of the most important of the newer ministries is the Ministry of Health. This was established in 1919 and superseded the Local



Government Board which had been set up in 1871. The fact of its being responsible for such matters as National Health Insurance, Poor Law, and Housing Acts, to mention only a few, gives some idea of the enormous importance of its work. It is therefore appropriate that the Department should be represented in Parliament by a minister whose office is reckoned as of high rank. The value of all work connected with national health is becoming increasingly realized by the public at large, and it is reasonable to suppose that the Ministry of Health will find ever-widening spheres of usefulness and will consequently be regarded with growing esteem.

#### 6. CHARACTERISTICS OF CABINET

We are now in a position to summarize the characteristic features of a modern Cabinet. In the main these are three.

**Common Policy.**—First, on every subject the Cabinet has an agreed common policy. In some measure this is the result of choosing all Cabinet members from one party. But the principle involves more than this. For example, if the Home Secretary desires, say, some reform of the Penal Code he lays his proposals before the Cabinet, and, if his colleagues are favourable to the principle of the reform, a measure in some detail is finally agreed upon. Once settled, that measure becomes the accepted policy of the whole Cabinet even though some individual members may differ on some of the clauses of the proposed Bill. Outside the secrecy of the Cabinet meeting they will not betray their disagreements. If, however, any member is unable to support the principle, as distinct from the details, of the Bill, it is regarded as a matter of honour that he should resign altogether from the Cabinet.



**Common Responsibility.**—This acceptance of a common policy almost necessarily involves the second characteristic of the Cabinet. When once a measure has been agreed upon and laid before Parliament, the whole Cabinet stands or falls on the success of the Bill. Thus, to return to the example quoted above, if the Bill proposed by the Home Secretary were defeated, then the whole Cabinet would resign. At a first glance it appears absurd that, for example, the India Office and the Admiralty should lose capable experienced administrators because Parliament does not support the Cabinet's methods of treating convicts. But there can be no doubt that the principle of Cabinet solidarity makes for political permanence and definiteness. Moreover, if ministers knew that no one would be affected by the fate of a measure except the individual responsible for the particular department involved, they might not give to Cabinet proposals in general the attention that they give under a system in which the success or failure of one involves the success or failure of all.

**Common Head.**—The unanimity of the Cabinet is typified by the third characteristic of the Cabinet, namely, subordination to a common head—the Prime Minister. The meaning of this should have become clear through our study of the history of the office. But it is well to repeat that, because that office was the result of a happy accident and not of deliberate intention, the Prime Minister has no legal standing whatever. He has no authority under Act of Parliament to give orders to the other members of the Cabinet or to dismiss members who disagree with him. He has not even a salary as Prime Minister. Hence every Prime Minister has to fill some office that is recognized officially. Most take the office involving least personal work, namely, that of the First Lord of the Treasury. But



the Prime Minister is at liberty to take any other of the principal offices of state: Mr. Ramsay MacDonald, when Prime Minister in 1924, assumed the office of Foreign Secretary. The only legal status the Prime Minister has, and the only ground on which he draws his salary, is not his Premiership but the collateral office which makes him one of His Majesty's Ministers of State. This, however, does not impair the practical authority of the Prime Minister over the other members of his Cabinet, though naturally the exact relationship between himself and them must depend in large measure upon his personal character and upon the type of men his particular Cabinet happens to contain.

## 7. WORKING OF CABINET

The actual day-to-day working of the Cabinet is, in the nature of the case, a matter upon which no one who has not been a member of a Cabinet can be really competent to write. There are, however, certain practical details which ought not to be omitted from review.

**Numbers.**—From the history traced above, it should be clear that the Cabinet is the outcome of successive state councils each of which was an inner committee of some larger body which had grown too numerous to be efficient. Hence the size of the Cabinet is a matter of no small importance. There is no rule or understanding fixing the number of ministers included in the Cabinet. Modern Cabinets always include the following dozen ministers: the First Lord of the Treasury (who usually is Prime Minister); the Lord Chancellor; the Lord President of the Privy Council; the Chancellor of the Exchequer; seven Secretaries of State (for Home Affairs, Foreign Affairs, Dominions and Colonies, War, India, Air, and Scotland); and the First Lord of



the Admiralty. Others are almost invariably, and one or two occasionally, added to these. Thus the Baldwin Cabinet of 1924-9 included, in addition to the above twelve, the Lord Privy Seal; the President of the Board of Trade; the Minister of Health; the President of the Board of Education; the Minister of Agriculture and Fisheries; the Minister of Labour; the Attorney-General; the First Commissioner of Works; and the Chancellor of the Duchy of Lancaster; making twenty-one altogether. In some Cabinets the Postmaster-General also has a seat. These numbers show a marked increase on those of earlier Cabinets. Pitt's Cabinet of 1793-1801 numbered only ten. From then there has been, with one or two exceptions, a steady growth in Cabinet numbers until the present day.

Whether past history is to repeat itself and whether out of this enlarged Cabinet an inner committee is to be evolved, is an interesting subject of speculation. Evidence given before a committee set up in 1917 to examine the organization of the Executive, showed that in practice not only had the Cabinet grown too large, but there was more than a tendency for the real control to be in the hands of a small inner Cabinet. This tendency came to a head during the Great War (1914-9) when Mr. Lloyd George, as Prime Minister, appointed a War Cabinet of five (later seven) members to meet frequently and to co-ordinate the work of all the Government departments. This system continued until 1919.

**Records.**—One Cabinet custom which became difficult with increasing numbers and which also the War broke down, was that of secrecy. This means much more than that members should not divulge any of the proceedings of a meeting. From the earliest days of the Cabinet, no minutes were kept of proceedings; not even was a minister allowed to make a private note



of a decision affecting his department. This absence of any written record was one of the most jealously guarded customs of the Cabinet. But during the War the number of Cabinet meetings increased enormously and the exact details of decisions taken were often of vital importance. Accordingly a Secretariat was set up for the purpose of making permanent records of Cabinet decisions and of conveying those decisions to the departments concerned. This body has been continued since the War and has now to be regarded as a permanent, if incidental, feature of Cabinet Government.

The officials of this Secretariat are, of course, not Members of Parliament, but are state servants with fixed salaries which constitute a regular charge on the Exchequer. Hence the total amount of their salaries has to be included in the financial estimates of the year and is voted in Parliament. The annual vote of the necessary money for the Cabinet Secretariat implies at least an indirect recognition of the existence of the Cabinet itself. This is the one exception to the general rule that the Cabinet as such is unknown to English law. Thus the establishment of the Cabinet Secretariat is a constitutional event of the highest importance.

Even such a cursory examination as has been possible in the later pages of this chapter, upon the working of the present-day Cabinet, leaves on the mind the impression that the Cabinet system is not by any means as fixed and permanent as we are often apt to assume. To what extent this impression may be confirmed, and to what extent the Cabinet may undergo development analogous to that of the past, only the future itself can unfold.



## CHAPTER V

## THE HOUSE OF LORDS

Almost every civilized state in the world has two Houses of Parliament, one House being an assembly of the people's representatives, the other an assembly whose composition varies widely from state to state, but whose work is to review measures passed by the former House, so that the consent of both Houses is necessary to all legislation. At once two questions confront us: if the democratically-elected chamber really represents the nation's will, why is a second chamber necessary? Also, in face of this problem, why is a two-chamber system all but universal?

The latter question is the more easily answered: the two-chamber system is due to the British Constitution's being the model followed by other states, and, though some states have tried experiments of their own, most have returned to the British plan. As we should expect from what we have learned already of the British Constitution, the origin of the system here was a series of unpremeditated circumstances and not a political theory. In tracing the history of the House of Lords from the earliest times to the present day, our object will be ultimately to find the answer to the former of our two questions, that is, to understand more clearly the true functions of a second chamber, and then to see to what extent the House of Lords fulfils these functions.

We deal with the House of Lords before the House of Commons partly because the former was historically the earlier but more especially because the strength of the Commons was in large measure the direct result of the gradual exclusion from the House of Lords of



classes of society who thereupon threw in their lot with the Commons.

## I. MAJOR AND MINOR BARONS

At the outset it is well to remind ourselves again that the source of the House of Lords, as of the other elements of our Constitution, was the Curia Regis, which was the King's feudal court attended by all the tenants-in-chief. There is one detail which needs to be emphasized at this point: we think of the term "baron" as a title of dignity, but originally the word was a technical term applied to any man who held land direct from the King in return for military service. In other words, a baron was a member of the King's court. But it is evident that, though this was the historical meaning, not very long after the Conquest a distinction arose within the class of barons thus defined. This division was due to the wide differences in the holdings of the members of the Curia. Some held large fiefs spread all over England; others—and these a large proportion of the whole—held only a single knight's fee each. There are indications that, even under the Norman Kings, these differences had a practical result which had become a settled custom by the time of Magna Charta.

**Magna Charta, 1215.**—It is important to keep constantly in mind that Magna Charta did not establish new privileges against the King but claimed merely to be a ratification of the already acknowledged rights and liberties of Englishmen. Clause fourteen of the Charter lays it down that: "For the purpose of having the common counsel of the realm for assessing an aid . . . we will cause to be summoned the archbishops, bishops, abbots, earls, and greater barons singly by our letters; and besides we will cause to be summoned by our sheriffs



and bailiffs all those who hold of us in chief." Thus already there was a recognized distinction between "major" and "minor" barons, the former being summoned individually and direct by the King, and the latter in general and indirectly through the sheriffs.

The results of this distinction were mainly two. First, because the lesser barons especially regarded attendance at court—involving, as we have seen, long perilous journeys and considerable expense—not as a coveted privilege but as an undesirable burden, they eagerly interpreted this general summons as being tacit permission to be absent. Hence in practice the Curia Regis was attended only by those summoned individually by the King. This led to the second result of the distinction between major and minor barons, namely, that instead of a baron's right to attend the Curia depending upon his feudal relationship to the King, it depended upon his receiving an individual writ of summons. In a word, the major barons had become peers, and the Curia Regis, instead of being the King's feudal court, was in all essentials the House of Lords.

**Other Characteristics.**—The distinction between major and minor barons was emphasized in two other directions. The major barons paid their feudal dues direct to their feudal lord, that is, direct to the royal Exchequer. The minor barons paid their dues through the sheriff. Also, when the King summoned his men to military service, the major barons led their own retainers, whereas the minor barons served under the sheriff.

**Results of Distinction.**—This division of the baronage into two distinct ranks had results upon the development of the constitution at large which simply cannot be exaggerated. Relieved of the burden of attendance at court, the lesser tenants-in-chief made their estates the centre of their interests. This, plus the fact that



many of them held only single knight's fees or thereabouts, meant that the one thing that really distinguished them from their neighbours had disappeared; now that the lesser tenants-in-chief no longer attended the King's court, or paid their dues direct to the King, or served independently in war, they drifted farther and farther from the greater tenants-in-chief and found that they had more and more in common with the sub-tenants and with the knightly class in general. Later, when representation in the House of Commons became established, the minor tenants-in-chief were represented by the knights of the shire. This drawing together of the lesser tenants-in-chief and the knights had immediate effects upon the composition and power of the House of Commons more than upon the House of Lords, and we shall return to the subject in the following chapter. Here we have to continue to trace the changes in what constituted a title to the peerage.

## 2. TITLE TO PEERAGE

**Writs.**—Almost the whole reign of Edward III (1327-77) was occupied, directly or indirectly, with the Hundred Years' War in France. This meant that the King was in constant need of money, which, in turn, made him increasingly dependent upon Parliament. The King's continual demands for money brought a corresponding expansion in Parliamentary business, which thus became more interesting than ever before. At this point the attitude of the barons began to undergo a change: a seat in Parliament was becoming a coveted privilege, so that a baron who had once received a writ of summons was disappointed if he did not receive another, and he did whatever was possible to retain his seat. Further, just as the tendency towards hereditary



succession in the feudal system generally helped to produce a hereditary monarchy, so it affected the right to attend the monarch's court: individual summons of attendance at Parliament, sent continuously through a baron's life, led his son to expect to receive a similar summons.

A baron's qualification for attendance at the Curia, from the fourteenth century onwards, was, then, hereditary right; but hereditary right alone did not suffice. In strict theory all the barons—greater and less—had the right to attend: what turned their potential right into actual permission was an individual summons from the King. It was such a writ which transformed a baron into a peer and thus transformed the Curia Regis into the House of Lords.

**Letters Patent.**—If this had been the final word in determining the peerage, the House of Lords would have consisted of a close little oligarchy of a few families with a legal position secure against King and people alike. Such a narrow clique would either have become all-powerful or—what is more likely—would have died a natural death as the families in question died out, a process which such almost continuous visitations as wars and plagues would have expedited considerably. At the end of the Wars of the Roses the number of the hereditary peers (that is, apart from the spiritual peers with whom we shall deal below) was not much above thirty.

Along with the process by which the peerage was selected from among the barons in general, the distinguishing mark being individual writ, there went another method of creating peers which began tentatively near the end of the fourteenth century. It seems to have arisen as follows.<sup>1</sup> Originally there was only one

<sup>1</sup> F. W. Maitland, *Constitutional History of England*, p. 167.



rank of nobility, namely that of baron. From the reign of Stephen onwards, earls were created. During the fourteenth century new titles were introduced from the Continent to give added dignity to certain individuals. Before that century was out, we find also dukes and marquesses, and, in the next century, viscounts. These distinctions were conferred by letters patent. The importance of this fact is that in 1387 Richard II used the same method to create a new baron. At first only rarely employed, letters patent became, from the middle of the fifteenth century, the regular means of creating new peers.

This involved an entirely new theory of the peerage. Originally, peerage (as distinct from the baronage in general) depended upon the possession of territory large enough to entitle the holder to be regarded as a major baron. That is to say, a peerage presupposed a barony. But, after the creation of peers by letters patent, no such association was necessarily implied. Finally, therefore, it became established that a peerage was constituted by the reception of a writ of summons followed by the actual taking of a seat in the House of Lords. Such a peerage was hereditary and was quite independent of the possession of a barony.

**Results of Methods of Creation.**—This method of creating peers has had far-reaching effects. To begin with, the King, by means of safeguarding clauses in the patent creating the peerage, acquired the power to regulate the succession to every new peerage. Actually the patent always stipulated that the peerage was to descend by rights of primogeniture to male heirs only. This effectively prevented the peerage's being taken by an heiress into another family, into which she might marry and which might be an enemy of the King. Further, the power to create a peerage by letters patent



enabled the King to make anyone a peer irrespective of property or of any other consideration. When dealing with the powers of the monarchy, we have already seen the use to which this power could be put in times of constitutional crisis.

One other effect of a peerage's being independent of a barony is that, just as the peerage cannot be transferred into another family through female succession, neither can it pass with the alienation of the land. Thus, if a peer were to sell all the land, by virtue of which his ancestors acquired the title, the buyer would not purchase the peerage with the land. A peerage is inalienable in the family on whom it was originally conferred. Hence, no one can sustain a claim to a peerage by reason of holding a barony.

### 3. SPIRITUAL PEERAGE

There is one qualification for a seat in the House of Lords which hitherto we have ignored almost completely, namely, that of church office. In studying the effects of the Norman Conquest on the Curia Regis, we saw that the archbishops, bishops, and abbots attended, not primarily because of their personal qualifications, but because they were great landowners and tenants-in-chief. In other words, the bishops and abbots were summoned because they were major barons, and as they continued to receive writs they became, in the full sense, peers. Their influence is indicated by the fact that, for example, under Henry VII, there were forty-nine spiritual peers in Parliament (two archbishops, nineteen bishops, and twenty-eight abbots), while the number of temporal peers during the same reign never exceeded forty. There was indeed no inherent reason why the great dignitaries of the church should not have



retained their power as peers on exactly the same footing as that of the lords temporal. Two events, however, led to the decline of their power.

**Judicial Power.**—The first was due indirectly to the House of Lords' being the supreme Court of Law. By Canon Law, the spiritual peers were prevented from being present at any trial which might involve loss of life or limb. On the other hand, they maintained tenaciously their own immunity from trial by lay courts; so that, whereas the other peers claimed the right to be tried by their fellow peers, the spiritual peers not merely refused to take advantage of this privilege but claimed that they had the right not to be so tried. Thus, in two respects, the spiritual peers were cut off from participation in the work and privileges of the House of Lords in its judicial capacity. This need not have affected their status in other respects as peers of the realm; but it did help to emphasize a distinction between them and the peers temporal, a distinction which was to widen as time advanced.

**Dissolution of the Monasteries.**—The second, and much more serious, adverse influence was the dissolution of the monasteries by Henry VIII, which, of course, involved the disappearance of the order of the abbots. Since under Henry VII the abbots outnumbered the bishops, the disappearance of the abbots meant that the spiritual peers who remained were woefully weak compared with the rest of the House. After the middle of the sixteenth century the number of archbishops and bishops stood at twenty-six as against about fifty lay peers, and this latter number steadily increased. Thus the spiritual peers definitely lost their preponderating influence in the House of Lords. Their status was officially settled in 1692 when the House of Lords declared that the bishops were lords of Parliament and not peers.



**Appointment of Bishops.**—The appointment of bishops since the Reformation has been and still is carried out as follows. The King sends to the cathedral chapter of the vacant diocese permission to elect a bishop—known as *congé d'élire*—but along with this he sends the name of an individual whom he “ recommends ” them to elect. If this candidate is not elected within twelve days, the King can appoint him by letters patent just as he can a lay peer. In effect, therefore, the King nominates the bishops.

**Number of Bishops in Parliament.**—During the nineteenth and twentieth centuries the phenomenal growth of population has necessitated an increase in the number of bishops. This, however, has not affected their number in the House of Lords. When the second new bishopric was formed (Manchester, 1847) a proviso was added to regulate the number of episcopal seats: this has applied equally to all the bishoprics formed subsequently. The arrangement is as follows: the archbishops of Canterbury and York, together with the bishops of London, Durham, and Winchester, always receive a writ of summons; the twenty-one other seats allotted to the spiritual lords are occupied in rotation by the other bishops, the bishop who has held his see longest having the right to the seat rendered vacant by death or retirement.

#### 4. FUNCTION OF A SECOND CHAMBER

The House of Lords, constituted as we have seen it to be, has not had an uniformly uneventful history or been always accepted without question. During the period of the Civil War and Commonwealth it met with scant consideration. The Rump Parliament, immediately after securing the execution of the King,



proceeded to destroy the other section of the Constitution depending on the hereditary principle. In March, 1649, the Rump resolved that "the House of Lords in Parliament shall be, and hereby is, wholly abolished and taken away". This action was virtually confirmed by the "Instrument of Government" (1653), which was a constitution drawn up mainly by army officers and which provided for one House of Parliament. It is therefore all the more noteworthy that in the "Humble Petition and Advice" of 1656, which was the basis of the last of the Commonwealth constitutions, provision was made for a second House.

Most European states have, in times of revolution, passed through similar periods of antagonism followed by a return to Second Chamber government. France affords a very clear example. The fact is that, though in peaceful times men almost unconsciously take for granted elements in their national constitution whose growth—like true growth wherever it is found—has been silent and unobtrusive, in times of revolution, when they are brought face to face with the theory of constitutional government, they do not always find it easy to justify the existence of a Second Chamber. In brief, at such times they realize the problem expressed with admirable terseness by Abbé Sieyès, the most fertile of the constitution-makers of revolutionary France: "If a Second Chamber disagrees with the first, it is mischievous; if it agrees with it, it is superfluous." All the more significant is the fact that after a break of only five years the French returned to the Second Chamber system of government. The conclusion, therefore, seems unavoidable that in practice a Second House does fulfil useful, even necessary, functions. What these are it is our business now briefly to investigate. In the main they are two.



**Prevents Hasty Legislation.**—The first arises out of the very nature of government itself. In practice the government of a country can be carried on by only a section of the people: the wishes of the majority must decide the policy of the whole nation. Only on the tacit understanding that the minority—whichever side that proves to be—agrees to submit to the decisions of the majority, is any government possible at all. The only alternative is anarchy. But this system of majority rule has its own inherent danger. If the submission of the minority to the majority is necessary to any government, equally is the majority bound to give every consideration possible to the interests and welfare of the loyal minority. Human nature being what it is, however, a government party flushed with recent triumphs at the polls is not always inclined to be as impartial as this, especially if it has been out of office for a long period. In such cases it is easily possible for the government to take advantage of its overwhelming majority to pass ill-advised legislation. This might be done, be it noted, in all good faith and without any conscious desire to reap a mere party advantage at the expense of the country as a whole. Such legislation might well be excused, if not justified, by the evident support of the great majority of the nation. Nevertheless, such hasty legislation, even though expressing the wish of a temporary majority, might not be in the permanent interest of the state. The value of a competent body of impartial advisers to review all measures passed by the House of Representatives, should therefore be apparent. The reviewing body need not necessarily have the power absolutely to veto proposals submitted to it; but it might well have power at least to postpone their operation for a period so as to allow public opinion to cool down and to form a mature judgment on the measures.



**Regular Revision.**—Further, the effects of even the details of Acts of Parliament are so far-reaching that, apart from the rather exceptional circumstances considered above, it is of the utmost importance that every Act should be most scrupulously examined before being finally put into operation. No more effective method of securing perfection could be devised than that of passing the measure to an entirely fresh body of people, unprejudiced by the opinions expressed by the other legislative assembly and bringing an entirely different point of view to bear. Indeed, the mere fact that another assembly is to consider the proposals should make the first assembly more careful and exact in its treatment than otherwise it might be.

The ultimate practical problem is how to ensure the appointment of a Second Chamber capable of achieving such high purposes.

## 5. MEMBERSHIP OF SECOND CHAMBER

The clues to the character of a revising assembly have been afforded already in our consideration of the work proper to such an assembly.

**Different from First Chamber.**—One thing should be clear at the outset: the Second Chamber must be constituted differently from the First or it can serve no useful purpose. Its members might be appointed, for example, because of ripe political experience, or culture, or services rendered to the state. No matter on what basis they are appointed, the essential thing is that the resulting assembly should be different from the other assembly.

**Must be Representative.**—The other factor to be borne in mind arises from the conditions of modern government. Whatever may have been the case in the



past, in the future we have to assume a democratic form of government in which every adult person has a real voice. We have therefore to devise a Second Chamber suitable to that political condition of society. The practical difficulty thus resolves itself into the question of how to secure a real element of election in the Second Chamber and at the same time produce a Chamber different from the First. To express the same problem another way: the Second House must be strong enough to stand against the First House, if necessary, without incurring the charge of acting selfishly or contrary to national interests; and this can be attained only by its members really representing the nation. Yet must not this mean that it will repeat the political prejudices of its fellows?

**Practical Expedients.**—The various states that have had to devise new constitutions without consideration of past history have sought to overcome these obstacles in various ways. Thus the Second House may be elected on an entirely different basis from that of the First House. Instead of electoral constituencies being composed of geographical divisions, they might conceivably be formed on an occupation qualification, each profession and trade—or group of professions and trades—sending a given number of members. This would provide a really representative assembly, yet one quite different in character from the other assembly. For the members to be elected for a definite period of time would make them independent of the political changes elsewhere. To increase the stability of the Chamber and to secure continuity of experience, the members could retire, not *en bloc* but by a system of rotation, say one-third at a time. To utilize mature political experience, a certain proportion of the Chamber might well consist of members appointed for life. Without at all suggest-



ing that this list exhausts the expedients that might be adopted to produce an ideal Second Chamber, a combination of these, or of some of these, ought to be conducive to that end.

**Numbers.**—One other consideration needs to be borne in mind. Whatever be the composition of the Second Chamber, its numbers should be small relative to those of the First Chamber. To be efficient as a revising body, it should resemble a committee rather than a great assembly or meeting. Thus the American Senate consists of only ninety-six members. The European Upper Chambers are mostly larger than this, but even their numbers range around three hundred.

## 6. HOUSE OF LORDS

We ought now to be in a better position to tackle the question of the extent to which the House of Lords fulfils the true functions of a Second Chamber. The answers to the question have been supplied already in the foregoing survey.

**Advantages of Hereditary Principle.**—The outstanding feature of the House of Lords is that the great majority of its members owe their seats to hereditary right, the exceptions being the Lords Spiritual and the Law Lords of Appeal, and, of course, those who have themselves been raised to the peerage. This hereditary principle as the basis of membership ought to have certain clear advantages. It ensures an Assembly in composition and character as different as could be devised from the House of Commons—a characteristic which we have seen to be an indispensable requisite in any Second Chamber. That the members do not resign their seats for re-election, indeed that they are permanently irremovable, should be conducive to



independence of judgment. The method of appointment by letters patent enables men of outstanding reputation in various spheres of life to be given peerages: examination shows that there is a constant stream of the ablest members of the House of Commons into the Lords.

**Its Disadvantages.**—But though these considerations weigh in favour of the House of Lords as at present constituted, others seem more than to counterbalance them. That this is not a matter of mere point of view is indicated by the various schemes of reform propounded by members of the House of Lords itself during the later nineteenth century and subsequently. Because this is likely to become a vital issue in the near future, it is well that we should be informed on the essentials of the situation.

To begin with, the fact that members sit by hereditary right and are therefore irremovable, means that they represent no one except themselves. Not only is this out of harmony with all the tendencies of a democratic age, but, when the Lords consider themselves bound to oppose legislation proposed by the Commons, they lay themselves open to the charge of setting the interests of their "class" above that of the state as expressed by the people's representatives. The permanence of members further results in their politics being unchanging except to a negligible degree. This is all the more unfortunate in view of the fact that an overwhelming number of the peers belong to one political party. When this is not the party in power in the Commons there is apt to be trouble: it was this that precipitated the crises of 1832 and 1910.<sup>1</sup> In modification of the possible interpretation that the House of Lords is prompted by "class" interests, is the unquestionable

<sup>1</sup> See pp. 40, 41 above.



fact that the hereditary principle acts far less harmfully in England than it has done in some other countries. In pre-revolution France every member of a noble family was noble, so that it was calculated that the total number was 110,000. The result was that nobles could and did find all their associates among their fellow-nobles, and only with the very rarest exceptions did they marry outside a noble family. In this way the French nobility became not so much a class merely as a rigid caste cut off, in interest and in outlook on life, from the commoners. England has never known anything like this, for the simple reason that, at any one time, only one member of a noble family is a noble: the sons and daughters of a peer are commoners. Thus the majority, not only of a peer's associates, but even of his family, are commoners. There is, therefore, no great caste of nobility in England as there has been in some foreign countries. The interests of the nobility have always been indissolubly bound up with those of the nation as a whole. Hence it is not surprising, though none the less significant, that in such historic crises as the signing of Magna Charta and the Civil War of the seventeenth century the pioneers in the cause of national liberty were largely peers. This is a factor we must bear constantly in mind when criticizing the hereditary principle as applied to the House of Lords.

The total number of its members is over seven hundred. In practice, however, the number ordinarily in attendance is small and quite within the limits suggested as desirable for a revising assembly, and consists for the most part of capable men experienced in many spheres of life. But it is true, on the other hand, that a large number of peers have no qualifications of exceptional experience, personal character, or



remarkable culture to entitle them to a seat on such a body. Indeed, a hereditary assembly could never be expected to consist to any considerable degree of outstanding personalities.

**Reform Proposals.**—The Preamble of the Parliament Act of 1911 stated "it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of a hereditary basis". In order to the fulfilling of that design, a committee was established in 1917 to explore the question and prepare a report. This was done, but no government has yet taken the responsibility of incorporating that report, or any part of it, in a Bill.

The present powers of the House of Lords will be explained in greater detail when we deal with parliamentary procedure and with the relationship between the two Houses. Its work as the supreme Court of Law will naturally be considered as part of our Judicial System.

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## CHAPTER VI

### THE HOUSE OF COMMONS

The House of Commons is a section of the Constitution which is of interest for everyone. It is the national institution in which we have the closest direct association, in which we are personally represented. The story of its growth and present working is, therefore, the concern of all.

#### 1. REPRESENTATION

**Idea of Representation.**—We cannot imagine a democratic state, that is, a state in which the people



govern themselves, that does not include an assembly of the people's representatives. Yet a little consideration will show that government through representatives is at best only a makeshift. In an ideal democracy every citizen would attend the state assembly in person and would express his own views on the questions at issue. This ideal was actually achieved among the Greeks and, in the early days, among the Romans. For each of the Greek states was a city-state. Each Greek state contained a space large enough to accommodate all the citizens of the state, so that the city assembly was attended by all the freemen of the state. The Greeks considered any state in which this was impossible as unwieldy and incapable of being efficiently governed. And, of course, they were right according to their theory of government; for the idea of representation had not yet emerged—the idea, that is, that one man *could* represent another, or a number of others.

But, clearly, when states grow in size it is impossible for all the members to be accommodated in any one place or to travel the long distances necessary to reach that place or to make their voice heard when they do reach it. That is to say, in modern states *direct* self-government is impracticable, and government is possible only indirectly through representatives. It took a long time, however, for this idea to grow, and a still longer time for it to be used on a national scale. Indeed, the early history of the House of Commons, reduced to the simplest terms, is nothing more than the story of the growth of the idea of representation and the application of the idea to the national assembly.

**Representation in Local Courts.**—The method of representation was applied earliest in the Local Courts of the Shire and the Hundred. These, it must always be remembered, did much work quite outside the scope



of what we mean by "courts". In these days the courts are places where men are tried for alleged breaches of the law and where judgment is pronounced upon their guilt by a Judge or some other officer. Formerly, however, the local courts transacted all the business of government necessary for the locality. In addition to dispensing justice, they collected many taxes for the King, and were responsible for good order and good government generally. Every freeman had the right to attend the local court, and, in the early days at least, could be compelled to attend.

The idea of representation crept into these courts in the following way. Not long after the Conquest the King got into the habit of using the local courts increasingly for his own purposes. Thus William I completed his great national survey, which was incorporated in "Domesday Book", in the following way. His commissioners visited every county to take sworn evidence from the sheriff, barons, and freemen in each hundred, and also from the priest, reeve, and six villeins of each village. In this latter fact we clearly have a very early example of representation, since the six villeins represented all the villeins. This was then an exceptional method of procedure, but, as time went on, the method became increasingly common. In 1181, in the Assize of Arms (i.e. a military ordinance issued by the King when "sitting" with his barons), Henry II declared that a jury of "lawful knights or other free and lawful men" were to assess their neighbours' wealth so as to estimate the military equipment which each man was to provide for himself. This system of selecting a jury as representing their neighbours was used more and more as time went on.

**Magna Charta.**—At first these juries were chosen by the sheriff, but by the time of Magna Charta (1215)



a change had evidently taken place. For article 48 of the Charter declared that bad forest customs "shall be enquired into immediately in each county by twelve sworn knights of the said county". We must bear in mind that in this, as in almost every other respect, Magna Charta did not establish a new principle. The whole claim of the Charter was that it merely re-affirmed liberties which were already the undoubted right of Englishmen. There can be no doubt, therefore, that by 1215 popular election of representatives in the county court was an established fact. The significance of this is all the more striking because the purpose of the election was to assess a tax.

Here, then, is the idea of representation already in operation in the local courts. We have next to follow the transference of that idea to the national assembly.

## 2. REPRESENTATION IN CENTRAL ASSEMBLY

**Henry III, 1254.**—The first notable trace of the practice came in 1254. In that year Henry III was in Gascony and needed money. So, in order to raise the necessary funds, the Queen and the King's brother, who were acting as regents, issued writs for an assembly to meet at Westminster. Each sheriff received a summons to "cause to come before our council at Westminster on the fifteenth day after Easter next, four lawful and discreet knights from your county whom the county shall have chosen for this purpose in the place of all and singular of the said counties to provide along with the knights from the other counties . . . what aid they will give us in this our great necessity".

The two points of outstanding significance about this writ are, first, that it summons representatives of the county courts to meet together in one central assembly,



and, second, that the purpose of the meeting was not merely to assess an aid but actually to grant an aid. The principle implied, though of course not stated in so many words, is that the King could not take the money unless it was granted, and that it rested with the people's representatives to say how much should be granted.

**Simon de Montfort, 1265.**—This has brought us very near the struggle between Henry III and his barons, who, headed by Simon de Montfort, demanded that the incompetent government of the King should cease and that he should adhere to the charters. Henry made promises but broke them. The barons therefore took up arms and defeated the King at the Battle of Lewes. Simon, confident of the support of the people, summoned a Parliament in which that support could be expressed. This was the famous Parliament of 1265. To this Parliament each Sheriff was ordered to return two knights from each shire, two citizens from each city, and two burgesses from each borough. This established a precedent which was not to be forgotten by later statesmen—notably by Edward I in 1295.

**Edward I, 1295.**—In that year the King was in desperate need of money, so, needing the goodwill of all his subjects, he summoned representatives of them all. The Model Parliament of 1295 was so thoroughly representative that its membership is worth quoting in detail. Seven earls and forty-one barons were summoned individually. Every archbishop and bishop was to bring the head of his chapter, his archdeacon, one proctor for his cathedral clergy, and two for the clergy of his diocese. Every sheriff was to arrange for the election of two knights of his shire (37 shires) and two representatives of each city and borough (110 places). The total number of members would be just over four hundred.

**Confirmatio Cartarum, 1297.**—Two years later an



interesting position arose. Edward, still needing money, had raised certain duties irregularly. The barons took up arms and compelled him to confirm the charters. This he did in *Confirmatio Cartarum*, in the following terms: "We have granted . . . that for no business from henceforth we shall take of our realm such manner of aids, tasks, nor prizes, but by the common consent of all the realm, and for the common profit thereof, saving the ancient aids and prizes due and accustomed." The final phrase allowed loopholes of escape from the main provisions, but the general principle was indisputable: by the end of the thirteenth century the King could levy taxes only with the consent of all the estates of the realm.

### 3. MIDDLE CLASS

Before we follow the later fortunes of Parliament thus constituted, there is one feature of its development, between the Norman Conquest and 1295, which needs emphasis. The outstanding difference between the Great Council of the Normans and the Parliament of 1295 is that a new class of the community had grown up and had obtained representation. Membership of the Norman Council was limited to nobles (or, at least, to nobles and tenants-in-chief), whereas Parliament represented also the great middle class of Englishmen. "Middle class" representation is one of the factors which distinguished the English Parliament from that of almost every other European nation; and the growth of the power of this class not only is interesting in itself, but also supplies the key to the understanding of much which otherwise is obscure in English political development.

**Origin.**—The nucleus of this middle class is to be found in the body of non-noble freemen. Evidence shows that this class of men who, though they had no



villeins of their own, did not hold their land as the villeins of a lord, was a very considerable one. Fortunately, two circumstances went to strengthen its power.

First, for reasons which we have already explained when tracing the history of the House of Lords, the Baronial class itself became divided into two ranks—the Major Barons and the Minor Barons. We have noticed, also, that the interests of the latter became increasingly allied to those of the knightly class. As time went on, these lower orders of nobility found less and less in common with the Major Barons above them, and more and more in common with the non-noble freemen below them.

Second, the rule—called “the law of primogeniture”—that the eldest son succeeded, to the exclusion of the rest of the family, obtained a hold in England to a far greater extent than in most other European countries. The result was that only one son of a baron would, on the death of his father, be a noble. The other sons would have neither the title nor the land attached to it.

**Its Importance.**—This union of the non-noble freemen with the lesser barons and their associates had an importance which cannot be exaggerated. If the King had continued to deal with all his tenants-in-chief directly, instead of through the sheriffs, or if the law of land-succession had been less strictly governed by the rule of primogeniture, there would have been evolved a close noble caste whose interests would have been purely selfish and strictly divorced from those of the other ranks of society. The inevitable result would have been the depression of the non-noble freeman to a status not distinguishable from serfdom. The simple fact that that did not happen, goes far to explain why the political history of England differs from that of every other country. The lesser barons and the knights



had, by their experience in the local courts and by all their family associations, exactly those qualifications for leadership which the non-noble freemen could never have supplied. Whereas the freemen class and the non-noble class would each have been too weak to make its power felt, they were politically invincible when acting in concert.

#### 4. LATER HISTORY

Thus, by a series of coincidences, there arose and grew in England a strong middle class which was to become the pioneer and champion of political liberty. But it did not achieve its object all at once or without a struggle. There remains the story of how Parliament, as the mouthpiece of the nation, and especially of how the House of Commons as the mouthpiece of the middle class, won its rights and liberties. Broadly speaking, that story has three stages: Tudor despotism, the struggle with the Stuarts, and the settlement after "The Revolution" of 1688.

**Position of Tudors.**—Parliament had scarcely taken its "model" form in 1295 when the Hundred Years' War broke out. This war abroad and the Wars of the Roses at home so fully occupied the attention of those classes represented in the Commons, that there was unlikely to be any marked development of Parliamentary power until some kind of settlement and peace allowed men to turn their thoughts to their own political rights. This brings us to the Tudor period. So far as their relations with the nobility were concerned, the Tudor Kings found themselves in a unique position. Not only had the numbers of the nobles been much reduced by the Wars of the Roses, both in battles and in executions, but all through those wars there had been con-



tinual confiscations of the nobles' estates by the King. As G. M. Trevelyan puts it: "The Wars of the Roses were a bleeding operation performed by the nobility upon their own body." We have seen already that the leaders of Parliament were the barons. Hence this weakening of the baronial body involved a corresponding weakening of Parliament, and so paved the way for Tudor despotism.

**Parliamentary Subservience.** — Many instances might be quoted to prove the subservience of Parliament to the Tudors. Three will be sufficient illustration for our purpose. First, an Act of 1539 empowered the King, with the advice of his Council, to make proclamations which should have the force of law, and disobedience to which could be punished by fine or imprisonment. Nothing could show more clearly the subservience of Parliament. Even so eminent an authority as Maitland calls this "the most extraordinary Act in the Statute Book".

The second illustration comes also from Henry VIII's reign. As we have seen in studying the 'Title to the Crown, three times during that reign Parliament altered the order of succession in accordance with the wishes of the King.

The third example is from the reign of Mary. At great length and very earnestly did Parliament struggle with the Queen against her marriage with Philip II of Spain. Yet, in spite of the undoubted fact that the nation was almost solid behind them, Parliament at last gave way to the persistence of Mary and consented to the marriage on certain conditions.

**Results of Subservience.** — Such was the subjection of Parliament to the Crown under the Tudors. Yet this very subservience had a consequence which no one at the time could have foreseen. The very fact that Parlia-



ment was so completely the tool of the Monarch meant that the latter was very willing to work through it and to use it to achieve the interests of the Crown. Because working through Parliament involved less opposition than a display of crude absolutism, the Tudors were quite content to use that means. The ultimate result was, however, the very opposite to that which they imagined. The Parliaments of the Stuarts were able to point back to the precedents thus established and to say, in effect, that even such sovereigns as the Tudors had never ventured to be so despotic as to ignore, still less to flout, the will of Parliament. Indeed, quite apart from any particular deduction, it surely is of noteworthy significance that the Tudors did work through Parliament. The simple fact stands that Henry VIII did not venture to issue proclamations without Parliament's consent, or to ignore a previous Act without lawful permission. Neither did Mary venture to marry Philip without Parliament's sanction, a sanction which was given only on Parliament's terms.

In short, though the despotism of the Tudors appeared for the time to crush the power of Parliament, in reality that despotism created the strength which Parliament was to need in its struggle with the Stuarts.

**Position of Stuarts.**—It needs no proof that the real question at issue between the Stuarts and their Parliaments was a struggle between the absolute power of the King based on Divine Right, on the one hand, and, on the other, the power of the King-in-Parliament based on the accepted rules of the Constitution. The first part of the struggle culminated in the Civil War, and the second part in the Revolution of 1688.

The crucial factor in the national situation which set the political tone for the Stuarts, was that the cloud which had overshadowed the nation abroad had been



effectively dispersed. All through the greater part of the reign of Elizabeth, the country lived under the dread of Spain. The Queen was therefore able to take the line that to oppose the will of the Crown was to embarrass the Government, which, in a time of crisis for the nation, was unpatriotic in the extreme. When the Commons did venture a suggestion relating to foreign affairs, she did not hesitate to bid them not to interfere in "deep matters of state". With the signal defeat of the Armada in 1588, that cause of Parliamentary subordination passed away. The Queen had, however, sufficiently won the loyalty of her people, partly by her personal wiles and partly by her indisputable service to the state, that she was able to maintain her power even after the external danger had passed. But it was not to be expected that a new line of Kings would be treated with the same respect, especially when they advanced claims to power such as no English Kings had ever dreamed of before, and which consequently appeared to the bulk of Englishmen as absurd.

The details of the struggle between the King and Parliament are not part of our present concern. What is of greater importance for our purpose is a consideration of the outstanding results of the struggle. These constitutional results are clearly summarized in the Bill of Rights and the Act of Settlement.

**Later Stuarts.**—The Stuarts had been signally defeated in the Civil War. Owing, however, partly to the attempted solution's being contrary to the whole traditional tendency of English life, and partly to the impossibility of finding a personal ruler worthy to fill the place left vacant through the death of Oliver Cromwell, the Stuarts were given a second chance. Charles II returned, the basis of his relationship to Parliament being set out in the Treaty of Breda, the terms of which he did not



hesitate to break, both as to spirit and letter. By the adroitness of his statecraft he managed to live successfully through a long reign of twenty-five years and to die peacefully in his bed. But the nation was not deceived, and, when James II set to work to outdo the personal rule of his brother without the latter's skill at chicanery, he was promptly resisted and overthrown. This led to the invitation to William of Orange. Hence the third stage in the development of Parliamentary power.

**Restoration Settlement.**—The coming of William, whose power rested solely on the invitation of a party in the state, presented an ideal opportunity for beginning afresh the whole relationship between the King and the Parliament. Metaphorically speaking, Parliament turned over a new leaf in the Book of the State and, at the head of the clean sheet, inscribed the conditions of Kingship. Those conditions took the form of the Bill of Rights, which in its essence was a bargain between King and Parliament. In effect, Parliament is saying to William: "We will make you King and support you, provided you keep these clauses." William is, in effect, saying to Parliament: "I will maintain these constitutional rights of Englishmen, provided you make me King."

**Bill of Rights, 1689.**—It is obvious that the very existence of any bargain between King and Parliament shows that the whole basis of Divine Right and the fabric—or, perhaps more truly, the fabrication—erected upon it have gone for ever. It is a bare statement of fact to say that the Bill of Rights of 1689 completed the work which Magna Charta had begun in 1215. The only details of the measure which concern us are:

1. The suspending power, that is, the power to suspend entirely the operation of a statute, was condemned as illegal. The Bill of Rights calls it "the pretended



power of suspending of laws or the execution of laws by regal authority, without consent of Parliament ”.

2. The dispensing power, that is, the power to dispense with the operation of a statute in certain particular cases, was declared to be illegal “ as it hath been assumed and exercised of late ”.

3. Parliament was to be elected freely, was to meet frequently, and to have freedom of speech.

4. There was to be no taxation without Parliament’s consent.

**Act of Settlement, 1701.**—The Act of Settlement in 1701 amended one omission of the Bill of Rights. It enacted, among other things, that no royal pardon should be pleadable to an impeachment by the House of Commons. This definitely established that ministers were responsible to Parliament for everything done by virtue of their office.

Taking these two Acts together, it is safe to conclude that not only the primary cause of dispute between King and Parliament, but also all the issues through which that dispute expressed itself in detail, were settled in favour of Parliament.

## 5. SCOTTISH AND IRISH MEMBERS

Hitherto we have considered only the representation of English boroughs and counties in the House of Commons. An account of the composition of that House needs, however, at least some explanation of the presence of Scottish and Irish Members.

**Scotland.**—After the accession of the Stuarts to the English throne in 1603, England and Scotland had the same monarch, but in every other respect were as separate and independent as previously. This was a situation which could have only one ending, and in



1707 the two countries became one. Only one of the provisions of the Act of Union concerns us at the moment: Scotland was to send forty-five members to the House of Commons at Westminster (a number which now stands at seventy-four) and the Scottish peers elected sixteen of their number to the House of Lords. The two kingdoms, thus merged into one, became the Kingdom of Great Britain, under the one Parliament.

**Ireland.**—The story of Irish representation is more complicated. Under a statute of 1495 known—after the name of the contemporary Lord Lieutenant—as Poyning's Act, English law was to apply to Ireland, no Parliament was to be held in Ireland without the consent of the King and Privy Council, and all Acts passed by such Parliament had to be confirmed also by the King. This régime continued until 1782, when, owing largely to the leadership of Henry Grattan in the Irish House of Commons, Poyning's Act was repealed and the Irish Parliament was made completely independent. Constant recurrence of political trouble in Ireland led Pitt, the British Prime Minister, to believe that the only way to ensure peace between England and Ireland was to unite the two countries politically. Accordingly in 1800 the Irish Act of Union was passed, and the Irish Parliament ceased to exist. One hundred Irish members were thenceforward to sit in the British House of Commons; twenty-eight peers were to be elected by their fellows to the House of Lords; and four bishops were to sit there by a system of rotation. Instead of solving the problem of Ireland, this measure made it only the more intense. All through the nineteenth century Ireland struggled for the repeal of the Act of Union.

The political aspects of that struggle must not detain us here; but the results on the composition of the House of Commons must be summarized. The ultimate—and,



as it appeared at one time, the insuperable—difficulty was that Ireland herself was cleft in two on the issue: Southern Ireland wished for independence, whereas parts of Ulster, with a population Protestant in religion and largely Scottish or English by descent, refused to agree to severance from England. This position was reflected in the Government of Ireland Act of 1920. Six counties in Ulster were given a Parliament at Belfast; the rest of Ireland had its Parliament at Dublin. The South, however, remained dissatisfied and the Act was virtually a dead letter. A further Act, the Irish Free State Act of 1922, therefore gave Ireland the status of a Dominion. The six Ulster counties took advantage of the option to contract out of the Free State: hence they remain under the provisions of the 1920 Act and send thirteen representatives to the House of Commons at Westminster. Thus the Irish Nationalist Party as a vital factor in English politics has disappeared from the House of Commons.

## 6. PRIVILEGES OF PARLIAMENT

There remains one further aspect of the growth of parliamentary power to be considered, namely, how Parliament, when once established, safeguarded its rights against outside interference on the part of the King on one hand, or of the public on the other. These rights are referred to as the "Privileges" of Parliament. At the commencement of every Parliament the Speaker claims for the Commons "that their persons and servants might be free from arrest and molestations; that they may enjoy liberty of speech in all their debates; may have collective access to His Majesty's royal person whenever occasion may require: and that all their pro-



ceedings may receive from His Majesty the most favourable construction". The privileges of Parliament are thus three, namely:

1. *Freedom of Speech.* This was a matter over which there had been many disputes, especially between the King and the Commons, for centuries. The question was definitely settled, as we have seen, by the Bill of Rights which declared that "freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament". That is to say, any member speaking in either House of Parliament may say anything he likes, whether true or false, about anyone at all, and yet not be subject to the law of slander. The real assurance that this privilege will be secured to members is found in the second privilege, namely:

2. *Freedom from Arrest.* By virtue of this right, no member can be arrested or imprisoned for a civil offence during a session or for forty days before or forty days after. This privilege does not apply to criminal offences, such as felony or breach of the peace.

3. *Right of Access to the Sovereign.* This is now not much more than a formal right. It applies to the House as a whole, not to individual members. The Commons now enjoy the privilege of access to the sovereign through their Speaker.

## 7. THE ELECTORATE

Such is the story of the development of the House of Commons. But, though that House was nominally the representative assembly of the nation, only since quite recent days has it represented more than certain sections of the nation. No account of the development of the Commons can be complete without a brief survey of



the changes in the electorate made, mainly, by the four Reform Acts of 1832, 1867, 1884, and 1918. The details of the passage of each of these measures belong to political and not to constitutional history, but the distinguishing features of each of them must concern us because these affected profoundly the resulting character of Parliament itself.

**Before 1832.**—Previous to 1832 the electoral system was full of almost incredible anomalies. Every county and certain boroughs returned two members. In the counties the only voters were forty-shilling freeholders. In the boroughs the franchise varied to such an extent as to defy summary. In some boroughs, votes were possessed by members of the corporation only; in others by all the ratepayers; while in others by the occupiers of particular houses called "ancient tenements". With the numbers of the voters thus restricted, it was a simple matter for the few concerned to be bribed heavily by the rival candidates: this was practised by all parties on a gigantic scale. Such a state of affairs was made immeasurably worse by the fact that the representation of many "pocket boroughs" was in the hands of individuals who nominated their borough members; indeed, it was not uncommon for one man thus to control several boroughs. Hence, especially as that individual was usually a peer and so had a vote in the House of Lords, the whole basis of the representative system was exactly reversed: instead of one member representing a large number of electors, several members represented one elector. The crowning-point of the ridiculous situation was reached as a result of the Industrial Revolution. At the beginning of the nineteenth century, while many places that were hardly definable hamlets returned two members, many growing towns like Manchester, Birmingham, and Sheffield



remained unrepresented. Some indication of the situation is given by the fact that, while the total population of Great Britain and Ireland was 16,000,000, only 160,000 had votes.

**Act 1832.**—The Reform Act of 1832 rectified the most glaring of the anomalies by redistributing the seats. Also, votes were given in the counties to long-leaseholders of property worth £10 yearly and to tenants-at-will of property worth £50 yearly, as well as to the forty-shilling freeholders, and in the boroughs to £10 householders. The electoral roll was thereby made nearly four times its original length.

From our present point of view there are two results of importance. First, the new franchise was anything but democratic as we now understand that term: the people who were enfranchized were mainly the richer trading classes. The old, unreformed system had at least history and custom behind it, and it could point to many illustrious statesmen whom it had produced; but the new system had neither past tradition nor present reason. There was no assignable explanation of drawing the line at £10 householders rather than at £9. There was no logical stopping-place between the old system and universal suffrage. The Reform Act of 1832 made further extensions inevitable.

The second result was that, since the preponderating number of new voters consisted of commercial and industrial men, the power of the old landowning classes began to be broken. Some time had to elapse before the full effect was felt, but gradually the power passed away from the few families who had ruled England, and the corruption hitherto characteristic of Parliamentary elections steadily declined. Slowly the type of member correspondingly changed.

**Act 1867.**—Both these results showed themselves



in the next generation. By Disraeli's Act of 1867, there was a further redistribution of seats; votes in the boroughs were given to householders, and in the counties to £12 occupiers. This added over a million voters, mainly artisans.

**Act 1884.**—In 1884 Gladstone was responsible for an Act providing for a further redistribution which, as far as practically possible, equalized the number of voters in the constituencies. Also, the franchise was made uniform in boroughs and counties alike, votes being given to householders and to lodgers. The total of new voters was reckoned at two millions, mostly in the villages.

**Act 1918.**—Full manhood suffrage came in 1918. For the first time votes were given to women also. But, whereas a man was eligible for a vote at twenty-one years of age, a woman had to be thirty. A subsequent Act (1928) has, however, given votes to women on the same terms as to men. The 1918 Act was calculated to add eight million voters and to bring the total to no less than 21,000,000, while the 1928 Act added yet another 5,250,000. The redistribution of seats which accompanied the other provisions of the former Act and which had been rendered necessary by the great increase of population especially in certain districts, aimed at making the constituencies uniform with as near 70,000 voters as could be achieved.

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We have now traced the growth of the House of Commons, that is of the representation of the middle class; the sources of the strength of that middle class; the fortunes of Parliament once established; the Privileges which the Commons enjoy and which ensure that their meetings are not futile; and finally the extension



of representation to all classes of the nation. We are now to proceed to a study of how Parliament uses its rights and privileges in making laws.

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## CHAPTER VII

### THE PROCESS OF LEGISLATION

The most effective and most interesting method of getting an insight into the working of the House of Commons is to pay a visit to the House when it is actually sitting. For the visit, a written order is necessary and can be obtained through a Member of Parliament, providing application is made a reasonable time before the required date. Everyone should certainly seize any opportunity for such an experience. Our present aim is—either because a personal visit is impossible or in preparation for a visit—to understand the process by which legislative proposals become law, or, in other words, to follow the stages by which a Bill becomes an Act of Parliament. This process is so intimately related to the customs and organization of Parliament that some account of Parliamentary procedure is necessary as a preliminary.

#### 1. PARLIAMENTARY PROCEDURE

**Sessions.**—In the earliest days of its history Parliament was able to complete so rapidly all the work it was called upon to do that a Parliament often lasted for only a few days. But the increased use which the Tudors made of Parliament, lengthened the life of their Parliaments to such an extent that each was divided up into



sessions in much the same way, and for much the same reasons, that a school or college has its year divided into terms. A session is different from a "sitting" on the one hand and from a "Parliament" on the other. A *sitting*, whether of the House of Commons or of the Lords, is the name given to the daily meeting of the House and is ended by an adjournment. A *Session* is ended by Prorogation, which has the effect of bringing to a close all the business of the session, so that any Bill which has not passed through all its stages at the Prorogation ceases to exist. If its passage is still desired, it cannot be carried on in the next session from the point which it has already reached: it must be reintroduced and pass through all the necessary stages in the new session. But Prorogation does not mean that members of the Commons have to seek re-election, since the following session will be only a continuation of the same Parliament. A *Parliament* is ended by Dissolution, which, like a Prorogation, is the result of a royal order on the advice of the Government.

**Speaker.**—One of the first acts of a new House of Commons is to choose a Speaker who will preside over its meetings. This election needs to be confirmed by the King. The rather quaint title of "Speaker" originated from the fact, which we have already noted, that in the early days the Commons did not pass legislation: they only petitioned the King to make certain reforms. This they did through their Chairman, and, because the latter voiced the desires of the Commons, he was appropriately called the Speaker. The first Chairman of the House to be referred to by that title was Sir Thomas Hungerford in 1376. The Commons always choose one of their own members for the position, and the greatest care and consideration are devoted to find the right man; for the office requires someone who is not only well



versed in all the intricate customs of the House but also someone gifted with consummate tact combined with firmness of temper in order to deal both with refractory members and with all sorts of delicate situations such as are continually arising.

A Speaker, once chosen, retains his office for the remainder of the Parliament. In practice, he is not opposed at General Elections and, provided he has been a success as Speaker, is re-elected Speaker in successive Parliaments. From the time he is elected Speaker he ceases to be a party-politician and must act with complete impartiality. Everything possible is done to emphasize and facilitate this. Thus he receives a salary which is not subject to a vote in the House but is fixed permanently. After his election the Speaker takes the oath of allegiance and his example is followed by the other members of the House. Only then is the House so constituted as to be competent to deal with business, and only then does the King personally attend to open Parliament. The formal opening takes place in the House of Lords, to the bar of which the Commons are summoned.

**Hours.**—During its sessions, the House of Commons meets daily from Monday to Thursday inclusive at 2.45 and continues to sit until 11 p.m., though this “eleven o’clock rule” is often suspended in order that urgent business may be completed. After prayers, with which each sitting opens, certain formal matters may be attended to, after which approximately an hour is devoted to “Questions”, when members are given the opportunity of interrogating ministers on matters relative to their respective departments. Thus the regular business is commenced about 4 p.m.

Certain sittings are, by the Standing Orders of the House, allotted to Private Members for the consideration of their Motions and Bills. The whole of Wednesday



sittings until Easter are appropriated for Private Members' Motions and Friday sittings until the later part of the session for Private Members' Bills. A Motion, as distinct from a Bill, merely tests the opinion of the House on some proposal—which may, or may not, later become part of a Bill. In other words, a Motion gives Members the opportunity of expressing their views, whereas a Bill is a definite proposal for the amendment of the law or for the making of a new law. Sometimes, of course, the Government finds it necessary to take Fridays in the earlier part of the session also in order to complete urgent business—especially financial business—by a given date. On Fridays the House meets at 11 a.m. and sits until 4 p.m.

**Closure.**—In order to facilitate the passage of laws, a system for the regulation of debates has come into vogue. This was necessitated partly by the natural increase of the business of Parliament and partly by deliberate attempts—notably by the Irish Nationalist party in the nineteenth century—to hold up the work of the House of Commons by protracted debates so as to hamper the Government. Accordingly, the “standing orders” of the Commons allow any member to intervene at any point in a debate with a motion that: “The question be now put.” Thus, if a member is of opinion that the House has made up its mind how it will vote, so that further discussion would be a waste of time, he can propose that the debate should close. The Speaker may feel that this would unfairly prevent the minority from making their point of view clear, in which case he can refuse to accept the motion. If it is accepted, the motion is put at once and if carried—provided at least one hundred members vote in its support—the question being debated is immediately put to the vote.

**Guillotine.**—The demands on the time of the House



have become so stringent that the control of debate has been carried even farther. A drastic form of ordinary closure known as "closure by departments" (commonly called "guillotine resolutions") has been proposed in respect of important Government Bills. A time-table is set up which not only allocates a certain number of days for the discussion of a Bill but prescribes that at stated hours the debate on a clause, group of clauses, or parts of a Bill shall be closed. When the prescribed hour is reached or, in the graphic and not inaccurate phrase which has become current, the guillotine falls, the questions necessary to pass the clause or clauses of the Bill within the compartment are put automatically to the vote, only amendments proposed by the Government being voted upon in addition to the given clauses. Such a method inevitably and continuously stultifies adequate discussion of Bills, but, until some means is found effectively to reduce the work of Parliament, no alternative seems possible.

**Whips.**—The actual arrangement of the business of the House and the organization of the members of the House is carried out largely by the Whips. Each party chooses some of its members, varying in number from three upwards, to be responsible for the organization of the party in the House. They send out notices—also called "whips"—to the members of the party, giving information about the business to be taken in the House and requiring their attendance for divisions.

The Government Whips fulfil important functions in addition to those of mere party discipline. More especially they arrange the time-table for the session according to the work proposed by the Government. They receive salaries derived from nominal Government posts which they occupy, though the duties originally pertaining to those posts have lapsed. The Chief Whip



to the Government is Parliamentary Secretary to the Treasury; the other Government Whips are Lords Commissioners of the Treasury, and some hold offices in the King's household.

**House of Lords.**—It will be noticed that so far, in connexion with the organization of Parliament, we have been concerned almost solely with the House of Commons. There are two details in which the House of Lords differs in this respect from the Commons. First, the Lord Speaker, who corresponds to the Speaker of the Commons, is the Lord Chancellor and, as such, is a member of the Government of the day and often expounds the Government's policy relating to a question under discussion. Thus he makes no claim to impartiality. Second, the rules of debate are much less rigid than in the Commons, there being no system of closure or guillotine.

The stages through which Bills pass are identical in both Houses, with the exception of Money Bills. Partly for this reason and partly because the procedure with respect to Money Bills in the House of Commons itself differs from that for other measures, we shall deal first with the making of laws in general and then separately with finance measures.

## 2. THE MAKING OF LAWS

Every Act placed upon the Statute Book must have been passed by the House of Commons and the House of Lords and must have received the royal assent.

**Method of Legislation.**—In view of the preponderating influence of the King in the early days of our history, and of the fact that Parliament developed in the first instance out of the Council which was called only to advise the King, it is not a little remarkable



that Parliament ever gained the power to legislate on its own initiative. The process by which it did gain this power is of some interest. To repeat, strictly speaking the only function of the early Parliaments, like the Council of which they were the development, was to express their opinion on matters raised by the King. Gradually, however, Parliament began to bring to the King's notice matters which they thought needed attention, and to petition him to take action upon them. But Parliament was a petitioner only, the King being free to act or not to act; moreover, anything he did might, or might not, accord with the expressed wishes of Parliament. Only too often the King made promises of redress which either were not kept at all or were kept in a sense other than that intended by Parliament. This treatment was facilitated by the short duration and spasmodic meetings of the early Parliaments.

Two things contributed to a change. First, as the work of Parliament increased, the sessions lengthened and so members, getting to know one another more intimately, began to take concerted action. This considerably increased their power to secure their will. Second, the growing control of the Commons over finance provided them with a lever with which, if need be, to force the King to grant their petition. In other words, they had the means of bargaining with the King: they could—and often did—make their grants conditional upon redress of grievances.

An indication of this trend of things is afforded by Henry V's promise in 1414 that nothing should "be enacted to the petition of the Commons contrary to their asking, whereby they should be bound without their assent". The meaning of this is plain: the King undertook not merely to give his attention to any particular grievance to which his attention was called but,



if he promised to act at all with regard to it, to do so exactly as the Commons asked. From that point, the Commons' request ceased to be merely a petition and became, in all essentials, a bill to which the King either assented or not without alteration as it was presented to him, that is, as it was passed by the House of Commons. We are now concerned with the exact meaning of the phrase "passed by the House of Commons", it being understood that the procedure is the same in both Houses and also that legislation—other than Money Bills—may originate in either House.

**Drafting of Bills.**—Even after the main purpose of a measure has been decided upon by the Government, much remains to be done before the appropriate bill is ready to be introduced into the House. The actual drafting of the bill is itself a matter requiring the very highest skill based on expert training and long experience. After any measure is passed, it will be subject to the arguments of lawyers in the courts, and to the interpretation of the judges. The framers of the measure must do their utmost to anticipate every possible circumstance in which it may become operative, and every clause must therefore be phrased with scrupulous care so as to bear the strain of legal interpretation. No amateur draftsman can possibly fulfil all these requirements.

Until modern times each Government Department had a legal adviser to draw up the bills for which the Department was responsible. But in 1869 there was established the Parliamentary Counsel's Office, and that office is now resorted to by all the Departments for the drafting of bills. Thus the services of the most highly skilled officers are at the disposal equally of all.

**Stages.**—Once drafted and presented to the House, every bill has to pass through five stages before it is



ready to be sent to the other House, namely, First Reading, Second Reading, Committee stage, Report stage, Third Reading.

The First Reading is a mere formality. A member may ask for leave to introduce a Bill or present a Bill. The real struggle begins with the Second Reading, when the general aims and principles of the bill are explained and debated. The various parties marshal all their forces and use their most effective debaters, for if the Bill succeeds in passing this stage it stands an excellent chance of becoming law. The debate on the Second Reading of important measures is often continued for several days at least.

When the House has shown its agreement to the general principles of the Bill, attention is centred on the details of the clauses. In order that these may be adequately considered, the Bill is referred to a Standing Committee, a Select Committee (that is, a committee appointed to take evidence from witnesses as to the probable effects of a particular measure and to report to a Committee of the Whole House), or a Committee of the Whole House, in which every detail of every clause is minutely examined. There are five Standing Committees to which Bills are referred. Each Committee consists of not less than thirty or more than fifty members, to which may be added, in respect of any particular Bill, not less than ten or more than thirty-five members. One of the Committees is known as the Scottish Standing Committee, and all Bills referring exclusively to Scotland are referred to that Committee. Of course the representation on each Standing Committee and every other Committee of the House is proportional to the relative strength of parties in the House of Commons. Money Bills, and any other Bills, when the House thinks fit, are considered even in detail,



not by a standing Committee, but by the House itself, the Bill then being said to be committed to a "Committee of the Whole House". The difference between the House as such and the House sitting in Committee is twofold: first, when in Committee the House is presided over by the Chairman or Deputy-chairman of Committees who occupies a place at the table in front of the Speaker's Chair, the latter being vacant: second, the rules of debate are less stringent and formal than when the House is sitting as such. The business of the Opposition at this stage, since they have failed to defeat the principles of the Bill, is to obtain the amendment of as many clauses as possible so as to modify its operation and to go as far as possible to defeat the original intention of the Government.

After examination by a Standing Committee, the Bill is reported to the House, and whether amended or not, must come up for consideration in the House on Report. At this stage further amendments can be proposed, although the rules of debate are stricter and less time is occupied at this stage than in Committee. If a Bill is not amended in Committee of the Whole House, a Report Stage is avoided and the Bill has then to be considered on Third Reading only when the principles of the Bill as it has been amended are debated.

**Royal Assent.**—It can now be assumed safely that when a Bill has passed through the necessary stages in the House the royal assent will follow. Since the King acts constitutionally and regularly only through his ministers, and since all legislation is either introduced by or permitted by the Government, refusal by the King to assent to a Bill would, in ordinary circumstances, be merely absurd. In fact, since the reign of Queen Anne, the royal assent has never been refused. This does not mean that the monarch has never interfered with legis-



lation. George III especially used his influence continually in politics, but he used it either to prevent the introduction of measures of which he disapproved, or to have them modified during their passage through the House. In any case, whether he approved or not, even George III did not venture to refuse assent to a Bill which had received the sanction of Parliament.

Such are the main lines followed by ordinary legislation. We have now to consider the procedure for Money Bills in particular, and it will be convenient at the same time to survey some general features of financial arrangement.

### 3. FINANCE

**Principle of Grants.**—We shall do well at the outset to get a clear idea of the principle on which all financial measures are based. No clearer statement of this is possible than that of Sir Erskine May, who thus summarizes the position: “The Crown demands money, the Commons grant it, and the Lords assent to the grant.” This accurately states both the relative functions of the two Houses with regard to finance and also the limitations of the Commons. They cannot grant money or vote taxes except as asked or recommended by the King’s ministers, though of course they have power to grant less than the ministers ask or to refuse altogether money for any particular purpose.

The idea behind this principle, whether originally so intended or not, is certainly a sound one. Experience shows that, in practice, the Commons urge the Government to spend money far in excess of what the Government ask. Individual members often have personal sympathy with particular schemes and the House is very apt, in moments of excitement, to be carried away by appeals to its generosity. Such votes, if at all fre-



quent or considerable, could not but affect the whole fabric of the Government's financial proposals. The present method assumes that every detail of the ministry's requirements has been carefully and coolly considered in the detached atmosphere of the department affected, and of the Council Chamber, and then has been subject to the curtailment of the Treasury demands.

**Committees of Supply and of Ways and Means.**—The Commons give detailed consideration to the Government's financial proposals by means of two committees: the Committee of Supply and the Committee of Ways and Means, these, like the other Committees referred to, being set up at the beginning of each session. The distinction between the work of these Committees respectively is, mainly, that the Committee of Supply, having considered the Government's estimates of its needs, votes the amounts required; while the Committee of Ways and Means has to decide the particular means by which the amount thus granted shall be raised. That is to say, the Committee of Ways and Means authorizes the issue, out of the Consolidated Fund, of the money required to meet grants made by the Committee of Supply and then, by imposing taxation, raises the money to foot the bill. The Chancellor of the Exchequer naturally presents his Budget of financial proposals to this Committee of Ways and Means.

**Consolidated Fund.**—The Consolidated Fund is the Government account held by the Bank of England. Just as a private individual or a commercial company has an account with one of the great banks, so the Government has an account with the Bank of England. Into this account all moneys received by the Exchequer are paid, and from this account all payments are made. Some expenses are permanent charges on the Consolidated Fund and never have to be re-granted by the



Commons—for example, the salary of the Speaker—whereas other sums need to be granted definitely by the Committee of Ways and Means.

**Appropriation and Audit.**—One problem which faced the Commons in the early days of its attempt to control national finance was that the appropriation of supplies—that is, the voting of particular sums of money to particular objects—would be nothing but a hollow mockery unless the Commons could also ascertain that the money had actually been devoted to the specified object. This is assured by a system of audit of accounts which is regulated by an Act of 1866. This Act established the Office of Comptroller and Auditor-General who has two main functions. First, his authority is necessary for every withdrawal from the Government's account at the Bank of England. Second, every year he has to present to Parliament a return showing income and expenditure for the year. This return is then subject to the scrutiny of a Public Accounts Committee consisting of members of the House of Commons. Their business is to see that the account rendered is accurate and, even more, that the money was spent on the particular objects to which the House appropriated it.

**Sinking Fund.**—A further problem connected with the national accounts is that, though the amounts voted by the Commons are based on the Chancellor of the Exchequer's estimates of what the state expenditure will be for the ensuing financial year, and that these figures are in turn based upon the estimates of the separate departments, two circumstances may arise to upset the calculations. On the one hand, the departments may spend more or less than they calculated; on the other, the taxes imposed may produce less or more than was anticipated. If the former alternative of either of these circumstances happens, the Treasury will be in



debt before the end of the year: this deficiency has to be met by supplementary grants. If the latter alternative happens, so that there is a surplus, that surplus can never be carried forward as a balance to the next year's account. For a principle of state finance is that each financial year is a self-contained unit, each one beginning with a clean sheet. Any money left over is then transferred to the Sinking Fund and goes automatically to the reduction of the National Debt.

#### 4. RELATIONS BETWEEN THE HOUSES

One question remains to be referred to, namely, the relationship between the two Houses of Parliament. We have said that every Bill, if it is to become an Act of Parliament, must receive the assent of both Houses. No matter in which of the Houses the measure originates, when it has passed through all its five stages there it must go, in the form finally agreed to in the Third Reading, to the other House, where it is subject to similar treatment. During its passage through that House it may be further amended; but, clearly, the Bill in its amended form has not received the sanction of the former House. Thence it is accordingly returned. If the additional amendments are accepted *en bloc*, the matter is settled; if not, a difficult situation may arise. Either one of the Houses must give way and accept the Bill of the other in its entirety; or they must both compromise; or the whole Bill must be dropped. When a compromise is attempted, it is usually carried out by means of a joint committee of both Houses.

**Effect of Reform Bills.**—The problem of disagreement between the two Houses is actually of only relatively recent date. As we have seen, previous to 1832, not only were the members of both Houses drawn from the same



ranks of society but, in a very large measure, the members of the Commons were the nominees of members of the Lords. Under such circumstances differences of opinion between the Houses were almost impossible, or, if by chance they did arise, were not likely to be serious or protracted. The nineteenth century, however, witnessed a striking change in this condition. One of the incidental results of the successive Reform Bills, beginning with that of 1832, was to produce an increasing divergence between the Houses. As the franchise has widened, the House of Commons has not only come to represent sections of the community with interests not identical with those of the Upper House, but the Commons itself contains a large proportion of members who are of quite a different type, and who have a general outlook on life quite different from that of the Lords.

This increasing disparity was certain to express itself in the actual political relationships between the Houses. For the most part differences have been settled by Conferences, but sooner or later there was almost certain to be conflict over some question on which the respective views were irreconcilable.

**Parliament Act, 1911.**—Such a crisis finally produced the Parliament Act of 1911. In dealing with the House of Lords we traced the events which culminated in that Act which aimed at regulating the relationship between the Houses in the following terms. First, any Bill which the Speaker of the House of Commons certifies to be a "Money Bill" cannot be delayed by the Lords for more than one month. At the end of that time, whether it has received their assent or not, it may be presented to the King. Second, any other Bill which has been passed by the Commons and rejected by the Lords in each of three successive sessions, may also be presented to the King for his assent, provided that two



years at least have elapsed between the Bill's second reading in the Commons in the first of those sessions and its passing the Commons in the third of those sessions, and provided also that it is sent to the Lords at least one month before the end of each of the sessions. The Act further reduced the life of a Parliament from seven to five years.

The net result of the Act on the relationships between the Houses is to abolish any power the Lords had in finance and to reduce their veto on legislation to a suspensive veto. That is to say, the House of Lords no longer has the power to reject legislation presented to it by the Commons, but only to prevent for two years the operation of such legislation, the theory being that in the interval the nation will have had ample opportunity to express its views on the matter, so that, before the end of the period, either the Lords will not maintain their opposition or the Commons will not persist in their presentation of the measure.

This situation was and is avowedly only a temporary expedient to ease a situation of extraordinary difficulty. Successive Governments have more than once declared their intention to put the relationship between the Houses on a regular, permanent basis. So far, however, the problem remains unsolved. Actually, this particular difficulty is bound up intimately with the larger and thornier question of the composition of the Upper Chamber, so that the two problems must necessarily be tackled together. A consideration of the immense issues involved, even as sketched briefly in the chapter above on the House of Lords, is sufficient to explain why Governments hesitate to plunge into such a maelstrom. Unquestionably this is one of the vital and basic problems of British politics.



## CHAPTER VIII

### THE JUDICIAL SYSTEM

At the risk of repeating what has been said earlier in our study, it is well to begin a survey of the judicial system of England by stating clearly that every efficient governmental system must have three sections corresponding to the three essential functions of government: a legislature to make laws for the well-being of the community; an executive to carry out the laws thus formulated, or to see that they are carried out; and a judiciary to interpret the laws and to judge breaches of them. In some governments these three aspects are so combined together as to be hard to distinguish from one another; in some they are sharply separated. Even a little consideration suffices to show that security of liberty, both personal and national, is dependent upon the effective separation of these three functions and upon their distribution between distinct departments of government. If, for example, the making of laws and the judging of breaches of them were in the same hands, then the power of the legislative body—no matter what the composition of that body—would be absolute. This is reflected in the story of the development of the judiciary, which is very little more than the story of the increasing separation of the judicial from the other functions of government.

In principle, the development of our judicial system has followed the same process as the development of our legislature. That is to say, in the early days of government in England its judicial functions were, in the main, carried out by the local folk-moots. Then gradually, especially after the Norman Conquest, the judicial work



of these assemblies was co-ordinated owing to the increasing power of the King until, finally, the King himself became the fount of justice, so that the local courts were not much more than the means through which the King exercised his judicial capacity, and the responsible officer in these courts was the representative of the King. Our first business is to trace this process.

## I. MEDIÆVAL COURTS

Reference should be made at this point to what was said in the introductory chapters respecting the courts of the shire, hundred, and manor. It will be recollected that before the Norman Conquest these local courts were responsible, among other work, for police duties and for the administration of justice.

In addition to these, the King, like any other feudal lord, had his court which, after the Conquest, was a court for his tenants-in-chief. But, apart from this strictly feudal aspect, there were certain matters connected with the administration of justice which specially concerned the King, such matters being known as "Pleas of the Crown". Most pleas of the crown arose through breaches of the "King's Peace".<sup>1</sup>

Perhaps at this point a word of caution should be added with respect to mediæval justice. A very great deal of the puzzling and even absurd characteristics in mediæval life appear such simply because the folk of that age adopted towards life an attitude which often is the very reverse of that which is ours to-day. If, therefore, we are to understand their customs we must try to approach them from the contemporary point of view. With regard to mediæval government, this is particularly true of its judicial methods. Two notable

<sup>1</sup> Maitland, *Constitutional History of England*, p. 108.



examples which immediately concern us are the King's Peace and the modes of trying prisoners.

**King's Peace.**—Primitive man has always tended and still tends—like the child that he really is—to think in terms of persons and to associate abstract ideas with persons. Thus to our minds peace is a general, abstract quality, but to the mediæval mind peace was something possessed by individuals, or, in Maitland's phrase, "every man has his own special peace and if you break that you injure him". To make this and its consequences clear we cannot do better than continue to borrow Maitland's illustration. This is how the idea of every man's having his own peace worked itself out: if C killed A in B's house, he had to pay compensation—called *wergild*—to A's kin, but, because the deed took place in B's house B's peace had been broken, so C had to compensate B. This compensation varied according to the rank of B, the amount increasing until the peace of the King himself was reached. For, like every other man, the King had his peace, the value of which was higher than that of anyone else.

In this respect also the increasing power of the King after the Norman Conquest made itself felt. Just as all land came to be regarded as the King's land, so all peace came to be regarded as the King's peace. By the end of the twelfth century it was established that any act of violence came within the jurisdiction of the King's court.

If this new theory was to be put effectively into practice, the King would need to establish appropriate means of dealing with breaches of his peace. Clearly all criminals could not be brought to Westminster to be tried personally in the King's court, especially in view of the condition of the means of communication. Since, then, the criminals could not be brought to the court,



the only alternative was for the court, in some form, to be brought to the criminals. That was precisely the solution adopted. The Assize of Clarendon in 1166 laid down that the King's judges were to go on circuit to inquire into deeds of violence. If, in the opinion of the judges, the accused were properly presented by sworn accusers—that is, by “jurors”—of the hundreds, they were to be sent to the ordeal for trial. This naturally brings us to the question of modes of trial.

## 2. MODES OF TRIALS

These were of two kinds: oaths and ordeals. At this point it is imperative to recall what was said above respecting the apparent absurdity of much connected with mediæval methods of justice. Thus, the procedure for trying criminals seems grotesque and nonsensical until we realize what was the supposition on which it was based. Briefly, the belief was that to arrive at a true judgment as to guilt or innocence passed the wit of man, and hence the decision was left to the judgment of God. A form of procedure was therefore adopted which gave God the opportunity to demonstrate whether an individual deserved to be punished or not. In other words, it was God who tried the accused and—to repeat what was said above—this was done through one or other of two processes: oaths or ordeals.

**Judgment.**—The preliminary to the trial consisted of the plaintiff's taking what was known as the “fore-oath”—which must be distinguished carefully from the oath in the trial itself—that the accused was guilty. This the plaintiff had to do according to the formula which custom had decreed. The accused then, if he pleaded “not guilty”—to use the modern term—had to refute the accusation by a similarly formal oath. The slightest



slip in the form of either would invalidate the faulty oath. If both the contradictory oaths were declaimed successfully, the court would be unable to decide which was true and which was false, and the only possible course was to say in which form the intervention of God should be invoked. In other words, the court decided whether the plaintiff or the accused should go to the proof and which of the two forms the proof should take. This was the only judgment the court passed.

**Oaths.**—If the court decreed that the accused should be tried by oaths, the procedure was somewhat as follows. Either the accused or the plaintiff—according to the court's decree—would have to take an oath of his own innocence or of the other's guilt. This oath had to be supported by the oaths of a certain specified number of the friends of the oath-taker. These friends—known as “oath-helpers” or “compurgators”—were not required to have any knowledge of the facts in dispute; they were required simply to swear that the oath-taker was not the kind of man to swear falsely. Now, an oath was an extremely solemn thing so that any man who took an oath was thereby pledging not merely his word, but his soul. The gist of the matter therefore was that the compurgators proved by their oaths that their belief in their friend's integrity was such that they were prepared to risk their own souls in support of him. If his opponent knew definitely that the original oath was false, he had at least the consolation that his enemies had lost their souls. So he was appeased and the crime was attoned. Thus the actual judgment was left to God.

**Scale of Oaths.**—One of the many seemingly curious features of the trial by oaths was that some men's oaths were of more value than the oaths of others. Indeed, there seems to have been almost a regular scale of oaths. The oath of a thegn (that is, a knight) was equivalent to



the oaths of six ceorls (that is, ordinary freemen). Also, more compurgators were necessary for a man of low rank than for one of high rank. What seems to have been reckoned by the court was not the actual number of compurgators but was rather the value of their combined oaths calculated according to the customary scale.

**Ordeals.**—Instead of trial by oaths, the court might decree trial by one of the ordeals. Of these there were four. In the ordeal of *hot iron*, the accused carried a hot iron nine steps; immediately his hand was bound up and the bandage was sealed and so remained for three days. At the expiration of that time the hand was examined: a festered hand was a proof of guilt; a clean hand denoted innocence. The same kind of procedure was followed in the ordeal by *hot water*, the accused having to plunge his hand into the water up to a given point. Perhaps the most curious of all the ordeals was that of *cold water*; for the accused was thrown in bodily and the proof of his innocence was that he should sink! The fourth was the ordeal of the *morsel*: the accused was given a piece of bread or cheese which weighed one ounce and which had been formally adjured to choke him if he was guilty.

**Punishments.**—These ordeals, formidable though they seem to us, were not the punishment: they were merely the means by which God was to show whether the man deserved punishment. If the forms of trial seem severe, the forms of punishment seem remarkably slight. There is no evidence of the existence of prisons, and executions were very exceptional. Punishments therefore almost invariably took the form of fines. These were of three kinds. The *wer* was a sum paid by a murderer to the kin of the dead man, whose rank would determine the amount of the fine. It is easy to imagine someone with a grudge against another deliberately calculating whether he could afford to indulge his vengeance.



against a man of that particular rank! Apparently a rich man could murder anyone with comparative equanimity. Quite possibly the explanation of some of these conundrums is that details of the system are lost to us. Any crime other than murder was paid for by a fine, called a *bot*, to the injured individual. In addition to these fines, the criminal had also to pay another, called a *wite*, to the King.

### 3. ORIGIN OF JURY


However, interesting as these details may be in themselves, their real value is the way the old system of justice contained the embryo from which our present system has slowly evolved. The distinguishing feature of that system is, of course, the jury, and it is with the development of the jury that we are immediately concerned.

We have to be on our guard against being misled into concluding that any body of twelve men concerned in a trial was a jury or was the origin of our present jury. We have to remember always that our jury does not consist of people who have any knowledge of the crime in question. Indeed, their primary qualification for impartiality is that they do not know anything. That is to say, we have carefully to distinguish between the jury, in our sense of the term, and witnesses.

**“Inquisitions.”**—Some historians have thought that they discerned traces of a resemblance to juries in very early days. But our purpose will be served sufficiently if we limit ourselves to Norman times and onward. The Norman kings became accustomed to obtain information they required respecting any part of their dominions by sending into the locality concerned an official who there gathered the men most likely to possess the required information, made them take an oath to



speak truly, and then subjected them to a series of questions. The most notable example of this form of inquisition, that is of inquiry, was that which produced Domesday Book. But the wholly exceptional nature of this result must not blind us to the fact that the method of inquiry then employed was quite common for eliciting information of all kinds. However, it must also be noted that the only resemblance such informers bore to a jury was that they were put on oath; otherwise they were quite different, for their one qualification was that they did possess knowledge of the facts at issue.

**Accusing Jury.**—Yet, by a freak of coincidence, one feature of the work of such “jurors”—which, of course, means nothing more than “people who take an oath”—became the nucleus of the later jury system. As the itinerant judges—with whom we shall deal more fully below—went on circuit, which they did regularly from the reign of Henry II (1154–89), sworn bodies of men had to declare what fines had fallen due to the King, for example fines on marriages and wardships. Among these were fines for crimes. As an offshoot of this association between these “jurors” and crime, the Assizes of Clarendon and Northampton (1166 and 1176) expressly declared that criminals were to be presented to the judges in the courts by twelve representatives of each hundred. Accused men so presented were sent to the ordeal. These sworn representatives of the hundred were the forerunners of the modern grand jury, as distinct from the petty jury. 

**Petty Jury.**—The actual origin of the petty jury is much more vague than that of the grand jury and is not attributable to any such declaration as those of the Assizes mentioned above. All that we seem able to trace is that in the reign of Henry II there was growing up the practice of allowing a man the right to choose whether



he would submit his case to one of the older forms of trial or to the decision of a jury of his neighbours.

This jury system, as an alternative to trial by oath or ordeal, became adopted generally through an action of the Church. In 1215 the Pope forbade the clergy to take part in ordeals. This implied withdrawal of Church sanction of the ordeal immediately killed the procedure, and the ordeal disappeared from England. The result was that after 1215 the jury system was the only alternative method of trial.

It is important to bear in mind that trial by jury according to the old English law was very different from the modern proceeding which has replaced it. The jury-men were the witnesses themselves, and they decided cases simply on their own knowledge and not upon evidence produced before them. For this reason they were always selected from the district in which the question to be tried arose. In the reign of Edward III occurred the first mention of witnesses' giving evidence without having any voice in the verdict. This is the first indication of the jury's deciding on evidence other than their own and forms the connecting link between the ancient and the modern jury. For a long time, however, juries were entitled to rely on their own knowledge in addition to the evidence given, and if they gave a wrong verdict they were liable to be prosecuted themselves. Their immunity from such risk was not finally and completely established until Fox's Libel Act of 1792. Jurymen of the present day are triers of the issue who form their opinion solely on the evidence adduced before them.

**“Peine forte et dure.”**—Even after the jury system remained as the only method of trial one difficulty remained. We have seen that any accused man had the right to exercise his option to trial by his neighbours.



But there was no law to compel him to do so. Hence, after the virtual abolition of the ordeal, unless the accused elected to submit to jury trial, there was no way by which he could be tried at all and he remained legally unconvinced if not innocent. If this method of escaping punishment were adopted systematically by criminals, the result would be nothing short of chaos. The solution was to make the prison life of those awaiting trial so intolerable that any form of trial would be welcomed gladly. This was the origin of what became known as *peine forte et dure*, which was the technical name for an atrocious system—which continued until 1772—of torture to compel a man to accept trial by jury.

If we find it difficult to understand why a man should prefer such treatment to trial in a manner which we are accustomed to consider one of the basic guarantees of liberty, we shall be helped by knowing that if a man were convicted of treason his land would escheat to the King and if of felony it would escheat to his lord. Many a man, therefore, knowing that his conviction by a jury was certain, preferred to remain unconvicted in order that his family might retain his land.

We have thus traced the gradual evolution of the jury system. Our next concern is with the development of the royal courts, with their erection and their relationship to one another.

#### 4. ROYAL COURTS

The noteworthy feature of the growth of royal justice is not so much the elaboration of a system of central courts as the extension of royal influence into the local courts of shire and hundred. This, of course, is yet another example of the centralizing tendency of the strong Norman Kings and of their immediate successors.



The old local courts underwent a change of character. Instead of being regarded as local courts they became the King's courts, in which justice was dispensed, not according to local customs, but according to national customs and law.

**Itinerant Justices.**—The chief instruments in effecting this transformation were the itinerant justices, that is the judges who went on journeys. The sending of judges to various parts of the country became common under Henry I (1100–35). In the first instance, the King's judges were dispatched to a particular district only when some exceptional business, probably affecting the King's interest or the King's peace, required attention. But by the end of the reign of Henry I, the practice had become a regular one. These itinerant justices were, of course, members of the King's court, so that, when they went into any locality, their presence virtually transformed the local court into a royal court.

Henry II revised the plan of Henry I and regularized it. Edward I (1272–1307) carried the system yet farther. The Statute of Gloucester (1278) enacted that no action for less than forty shillings was to be brought before a King's justice. The idea in the minds of the framers of the statute apparently was that to bring men from a distance to be tried at Westminster for a trivial offence was an unwarrantable hardship. But, as events turned out, the Statute of Gloucester had a quite unforeseen result; for it was interpreted by the judges themselves to mean that *all* actions for more than forty shillings were to be brought before a King's justice. This inevitably resulted in a drastic limitation of the work of the local courts—that is, of the local courts when no justice was present—which henceforward were competent to deal only with relatively small suits. Moreover, as the value of money steadily declined, the competence



of the local courts was correspondingly curtailed. Hence the work of the itinerant justices continually increased. To deal with this growing business, Edward I in 1293 divided England into four circuits, each circuit having two judges who should sit—that is, should hold “assizes”—in the chief centres of their respective circuits, and should be so engaged continuously.

The effect of the Itinerant Justice system upon the actual law administered will be dealt with below under the subject of Common Law.

**Central Courts.**—In the meantime the King’s central court of justice—the Curia Regis in the narrower sense—had been developing. This followed the lines which we have watched in other directions also, namely, that of the division of functions among various sections of the court.

A great impetus to this process of specialization was given when the Justiciarship lapsed temporarily in 1234 and permanently some thirty years later. The Justiciar had been a kind of understudy to the King and had a controlling voice in every section of government, but, as we have seen, the extinction of this office made room for the rise of specialist ministers, for example, the Treasurer and the Chancellor. A similar result followed in the King’s court, regarded as a court of justice. Already there had been something more than a tendency for the members of that court to divide off into three separate bodies, each attending to a particular class of cases. This differentiation became much more sharply defined when, after the disappearance of the Justiciar, instead of that officer’s presiding over all the courts, each court had its own president or chief justice. The three courts in question were the King’s Bench, the Court of Common Pleas, and the Exchequer.

**Court of King’s Bench.**—The Court of King’s Bench



was so called because it was the court where the King in person administered justice. For a long time the judges attached to this court actually accompanied the King as he moved from place to place round his kingdom. Towards the end of the Middle Ages—say, during the fourteenth century—the King ceased thus to perambulate around the kingdom and hence this court, like the other two courts, became stationary at Westminster. The Court of King's Bench, being that with which the King himself was most intimately concerned, naturally was occupied mainly with cases which most nearly affected the King's interests or, in other words, with pleas of the crown. These, as we have seen, would comprise all breaches of the peace, that is, criminal cases generally. It might be a court of first instance for such cases, and the important cases involving breach of the peace might be transferred from local courts if the particular circumstances or persons involved seemed to make this desirable. It was also the court through which the King controlled his officers, the sheriffs, in the counties.

One factor resulting in a marked increase in the work of the court was that its judges were paid out of the fees from the cases they tried. In order to make their posts as lucrative as possible, the judges therefore tried to attract business into their court. Much of this was business outside the strict province of the King's Bench Court, and hence the work of the respective courts is not easy exactly to define.

**Court of Common Pleas.**—The Court of Common Pleas was the court which dealt with cases between man and man, cases, that is, in which the King's interests were not immediately affected. Such cases would be the usual civil actions. The obvious inconvenience of subjects having to chase round the kingdom after the King



in order to find a court where their quarrels might be arbitrated, led the Court of Common Pleas to be fixed at Westminster. Thus John agreed in Magna Charta: "The Common Pleas shall not follow our court, but shall be held in some certain place."

**Exchequer Court.**—The one class of case, directly affecting the King's interest, with which the Court of King's Bench did not deal was that relating to the royal revenue. Under Henry I, and much more definitely from the time of Henry III onwards, a third branch of the Curia began to be responsible specifically for finance. At first its work was very varied, not to say confused. It actually collected the King's revenue twice annually from the sheriffs. This, as we have seen, became in due course the business of the Treasurer's department. As a judicial assembly, it considered the pleas of those who had financial claims against the King.

Outside this proper sphere, because of its association with questions of money, the Exchequer Court gradually managed to attract cases involving debts between subject and subject. Thus the Exchequer, as well as the King's Bench, encroached on the domain of the Common Pleas.

**Star Chamber.**—The above are the central courts which have retained a permanent place in our judicial system or at least have made a permanent contribution to that system. But some references at least must be made to the Court of Star Chamber which once filled so important a place among English courts, but which, having fulfilled—not to say exceeded—its original functions, was abolished. The actual origin of the Court of Star Chamber and its exact relationship to other elements of our constitution, are still matters of much uncertainty. The ascertainable facts seem to be as follows. When Henry VII came to the throne in 1485,



after the Wars of the Roses, he set himself to restore order and respect for law. The latter was menaced especially by the great lords, who maintained armed bands of retainers with whom they did not scruple to overawe local courts before which the lord might be summoned to appear for breaches of the peace. Accordingly, in 1487 an Act was passed establishing a committee of the King's Council to suppress these evils and, in short, to deal with any case which the local courts might not be strong enough to deal with. This committee consisted of the Chancellor, the Treasurer, the Keeper of the Privy Seal, a Bishop, a temporal Lord, and the two Chief Justices. Not long after this we find a court called the Court of Star Chamber, which seems to have derived its title from the star-decorations of the room in which it habitually met. The difficulty in relating this court either to the statute of 1487 or to the other courts is, first, that the Court of Star Chamber included all the members of the Council—not merely the committee nominated—and, second, that it did not limit itself to dealing with the particular crimes enumerated in the creating statute. The simplest solution to the enigma appears to be that the Star Chamber really exercised the powers which the Council as a whole had always possessed but which in 1487 had been delegated to a particularly strong committee for a particular purpose. Thus some confusion between the full Council and its judicial committee was not unnatural, for, as the position has been aptly expressed: "The Star Chamber became . . . the whole Council sitting in its judicial capacity."<sup>1</sup> When the particular task which the Star Chamber had been appointed to do was accomplished, it ceased to meet separately so that the full Council continued to exercise the powers of the Star Chamber, and

<sup>1</sup> Medley, *English Constitutional History*, p. 102.



to strengthen its position by claiming to be covered by the 1487 statute.

There can be no doubt as to the beneficial results of the work of the Chamber. The disorderly lords were put in their proper places; the weak were protected; and, not least of all, the local courts, no longer terrorized into injustice, were able to resume even-handed treatment to all alike. However, like many another good institution, the Court of Star Chamber outlived its usefulness and was used by the Stuarts to pervert justice. Accordingly, one of the first acts of the Long Parliament when it met in 1640 was to abolish the Court of Star Chamber along with certain other similar institutions.

## 5. JUSTICES OF THE PEACE

The continued insistence throughout this chapter on the centralizing influence of the King on the local tribunals, must not be interpreted to mean that the local courts went out of existence. On the contrary, from the reign of Edward III (1327-77) local jurisdiction received a new lease of life owing to the appointment of Justices of the Peace.

**Origin.**—Strictly speaking, the office was not then a new one. In embryo it can be traced back for well over a century. A proclamation of the year 1195 appointed knights to take an oath from every man over fifteen years of age by which everyone undertook to keep the peace and to pursue criminals; criminals thus captured were to be handed to the knights and by them to the sheriffs. Several Acts throughout the thirteenth century in effect confirmed the original proclamation and, incidentally, greatly elaborated the powers of the knights. In 1327, that is, in the first year of Edward III, an Act provided for the appointment in every county of Conservators of



the Peace. In 1360 the "Conservators of the Peace" became "Justices of the Peace", it being enacted that one lord and three or four others, together with some having a knowledge of the law, were to be appointed in every county. By the same Act the Justices were given increased power, so that they were qualified, not merely to pursue criminals, but also actually to try those accused of felony. From this time forward the functions of the Justices of the Peace were steadily enlarged until, under the Tudors, the Justices were responsible for an almost incredible variety, and what must have been an almost intolerable mass, of local government work. It can hardly be an exaggeration to say that during the Tudor period hundreds of statutes were passed adding to their labours. To trace in detail these and subsequent changes in the powers and status of the Justices of the Peace would be beyond the scope of our study. The following paragraphs will outline their present position and functions, which vary considerably according to the number of Justices in session at any given time.

**Appointment.**—Except in the City of London and with the addition of certain persons who have been authorized by statute to act as Justices by virtue of their office, the Justices of the Peace consist now of persons who are appointed by the Crown on the nomination of the Lord Chancellor, who acts either on his own responsibility or, more generally, on the recommendation of the Lord Lieutenant of the County in the case of the County Justices, and on the recommendation of the Borough Council in the case of Borough Justices. In recent years special advisory committees have been appointed for the purpose of recommending suitable persons. The only qualification now necessary is a residential one.

**Stipendiary Magistrates.**—In boroughs and in



Urban Districts with a population of at least 25,000, Stipendiary Magistrates may be appointed to act in place of or in addition to the local Justices of the Peace. The appointment is made by the Crown through the Home Secretary on the application of the Council of the Borough or Urban District. The appointment is confined to barristers of at least seven years' standing, in the case of Boroughs, and five years' standing in the case of Urban Districts. The Stipendiary's salary is fixed by the Crown but payable by the Borough or Urban District for which he is appointed. He has the power to do alone any act and to exercise any jurisdiction which may be done or exercised by two Justices of the Peace.

**Metropolitan Magistrates.**—Salaried Magistrates are appointed to execute the duties of Justices of the Peace at stated places within the Metropolitan Police District. The appointment is made by the Crown on the recommendation of the Home Secretary, and the qualification is practice as a Barrister during the previous seven years.

**Jurisdiction.**—Justices have statutory power to deal with certain classes of civil cases, but their powers are exercised mainly in criminal cases. In the latter they hear and decide matters which may be summarily dealt with, and they inquire into other classes of offences which may not be so dealt with. In the latter case it is their duty to commit the offender for trial if the evidence raises a probable presumption of guilt, but it is not their duty to decide upon his innocence or guilt.

A *Single Justice* has power to try certain minor offences, and also to inquire into more serious offences and either to dismiss the case or commit the offenders for trial.

*Petty Sessions* is the name given to a meeting of two or more Justices, and ordinarily Petty Sessions deals



in the first instance with all cases of crime. County Magistrates are appointed for the whole county, but in practice they carry out their duties mainly in the Petty Sessions of that division of the county in which they live. Every Petty Sessional Division has a Justice's Clerk whose duties—in addition to giving technical advice to the Justices, who themselves have no expert knowledge of the law—consist of keeping records of all proceedings before the Court and of keeping accounts of all fines and penalties imposed. The Clerk is usually a Barrister or Solicitor. From the Court of Petty Sessions there is a right of appeal to Quarter Sessions.

By no means all the work of Magistrates is trivial in character. The *Court of Quarter Sessions* is convened four times a year and all Justices are entitled to attend. Two are sufficient to form a quorum, but actually Quarter Sessions consists of a numerous and representative gathering. Its proceedings are presided over by the Chairman—elected by his fellow Justices—and the procedure, but not its powers, are similar to that of a Court of Assize. The principal officer of the Court is the Clerk of the Peace, who compiles the jury list from which the jurors are chosen. The Court includes a Petty Jury and can try serious criminal offences except about twenty-five, which include treason, murder, perjury, and forgery. From the Court of Quarter Sessions, an appeal lies to the Court of Criminal Appeal.

For every offence, except assault, the accused is entitled to be tried by jury if the punishment to which he would be liable on conviction is a term of imprisonment exceeding three months.

In those Boroughs which have a separate Court of Quarter Sessions, the Court is held by the *Recorder*, who sits as sole Judge. He must be a Barrister of five



years' standing and he is appointed by the Crown and receives a salary.

**County Court.**—One other court calls for notice. This is the County Court, which must be carefully distinguished from the old shire and county courts. The County Court as at present constituted was established by the County Courts Act of 1846, since when other statutes have modified and added to its powers. The County Court has no criminal jurisdiction, and originally it was a court simply for the recovery of small debts. This is still one of its most important functions, but the tendency of modern legislation has been to throw more and more work on to the County Court until, at the present day, although it is only an inferior Court, it is one of the most important Courts in the Judicial System of the country. The Rent and Mortgage Interest Restrictions Acts are an instance of the enormous amount of additional work placed under the jurisdiction of the County Courts.

County Courts are established for certain districts and are presided over by a County Court Judge, who holds courts at certain towns in his District on such dates as he appoints, which are usually at least one in each month. A County Court Judge is appointed by the Lord Chancellor and must be a Barrister of at least seven years' standing.

## 6. COMMON LAW AND EQUITY

Throughout this chapter we have been concerned with the evolution of courts of various types, both central and local, but so far no mention has been made of the law they administer. We are accustomed to think, in a vague way, of law as being enacted by Parliament. In two respects at least this notion has to be modified.



First, it is obvious that in the earliest days this cannot have obtained, if only because there was no Parliament to pass legislation. Second, a great deal of law, enforceable in a law-court, cannot be found in any statute.

**Origin of Common Law.**—The basis of English law as administered in our courts is “Common Law”, which has arisen in the following ways. That the English nation is the result of a fusion of a number of separate and even warring tribes, is in itself quite sufficient to suggest that, before the fusion was complete, each district would be governed by the customs of the tribe which originally dominated that district. Moreover, the lack of efficient means of communication from place to place, and the weakness of what central government there was, together tended to perpetuate such differences of law. That there would be certain elements of rudimentary justice common everywhere was to be expected, but, apart from these, wide differences existed. Now the original, simplest meaning of “Common Law” is “law *common* to the whole country”, general law, as distinct from local customs. This naturally would consist mainly of those elements common among all peoples. To-day, however, the term has a more precise meaning.

The laws of England may be divided into two kinds—the unwritten (or Common) law, and the written (or Statute) law. Ecclesiastical Law may be similarly divided. The unwritten law has the same force and effect as the statute law. It depends for its authority upon the recognition by the courts of the customs and principles formerly existing among the people, and it is now contained in the decisions of the judges recorded in the Law Reports. The original authority of the Common Law is not set down in writing, as in the case



with Acts of Parliament, but is based upon immemorial usages throughout the realm.

The function of interpreting the Common Law, as well as the Statute Law, lies with the judges of the courts and, in the last instance, with the House of Lords. When a superior court has once laid down a rule or an interpretation, such a decision becomes practically binding upon all courts of equal standing, and effectively binding upon all courts of lower standing unless and until it is altered by the decision of a higher court or an Act of Parliament. Indeed, even the slightest reflection is sufficient to show that any other course of action could lead to nothing but chaos in the law courts. Such judgments, therefore, unless and until altered as mentioned above, are for all practical purposes as effective and binding as statutes. The House of Lords is absolutely bound by its own prior decisions, and nothing but an Act of Parliament can remove them.

**Establishment of Common Law.**—The development and permanent establishment of Common Law were due mainly to two factors. First, the regular system of itinerant judges meant that the same law was administered all over England. The influence of this on the evolution of a body of law common to the whole country will be appreciated readily. Second, in the early days, the only people who had the least element of anything that could be called education—and therefore the only people with any qualification for dealings with the law—were the clergy. But by the early thirteenth century a lawyer class, not drawn from the clergy, began to grow up. Before the end of that century there arose the Inns of Court which were law schools in which law was studied and, for the purpose of study, classified. Thus all the lawyers learned, and afterwards expounded, one body of law—"common" law.



**Equity.**—This term “Common Law” is sometimes used in contrast to the term “Equity”. Often, when the law was in its primitive and rather rudimentary condition, cases arose in which justice was not enforceable by the Courts of Common Law, not uncommonly because a similar case had not been presented before. Equity was the system of law by which justice was administered by the Court of Chancery upon certain defined rules and established principles, which were, however, liberally expounded by the judges in order to meet novel exigencies as they arose. Equity construed positive laws, not according to their strict letter, but rather according to their spirit: it thus relieved the rigours and supplied the defects of the Common Law.

On account of the inelasticity of the Common Law, a plaintiff was frequently without any sufficient means of redress. His only course was to petition the King, who thereupon referred the matter to his Chancellor. Eventually the Court of Chancery became a permanent institution distinct from the Courts of Common Law. This naturally led to some duplication of work and, not infrequently, to confusion. Maitland gives an example: “You contract to sell me land and refuse to carry out your contract: the Court of Common Law will give me money damages, the Court of Equity will command you to fulfil your contract, and in case you disobey will put you in prison.”<sup>1</sup>

## 7. REORGANIZATION OF COURTS

The confusion was increased by the complicated system—or lack of system—of the courts themselves. Because the central courts had grown up one by one according to the accidental demands of circumstances,

<sup>1</sup> *Constitutional History of England*, p. 471.



their organization and their relationship to one another were woefully haphazard. This resulted in overlapping of work and often in uncertainty as to which court was the proper one to deal with any particular case. Indeed, as in the instance quoted above, it was not uncommon for a litigant to have to resort to two courts in order to obtain complete justice.

Accordingly in 1875 the whole system was thoroughly overhauled and reorganized. We may say that previous to that date there were seven ancient superior courts of first instance, that is, as distinct from appeal courts. In addition to the King's Bench, Common Pleas, Exchequer and Chancery Courts which we have noticed, there were also the Courts of Admiralty, Probate, and Divorce. By the Judicature Act, these were all merged into one "Supreme Court of Judicature", this then being subdivided into the High Court of Justice and the Court of Appeal. The former has three subdivisions: the King's Bench Division—doing the work of the former courts of King's Bench, Common Pleas, and Exchequer; the Chancery Division; and the Probate, Divorce, and Admiralty Division. From the High Court, appeals may be made to the Court of Appeal, and from the latter to the House of Lords. At the same time the rules of Equity became enforceable in all the courts, so that the dual system of Equity and Common Law ceased to exist.

## 8. HABEAS CORPUS

The concluding section of this chapter will be relatively brief, but the subject with which it is concerned deserves separate treatment, because it forms the very basis of the security of justice to the individual. The most perfect body of law and the finest court system will be in vain unless the individual has the means of



having his case tried under that law and by an impartial judge.

In many countries it was not uncommon for a man to be imprisoned for an indefinite period at the whim of the monarch or of some court favourite, as, for example, by a *lettre de cachet* in pre-revolutionary France. Englishmen have never suffered under such a system. Without entering into details we may say that by the thirteenth century any man who was imprisoned could obtain, or his friends could obtain for him, a writ of "Habeas Corpus" from the Court of King's Bench, compelling the gaoler to "have his body" into court for trial. During the Stuart period especially this customary right was so violated, that in 1679 the famous Habeas Corpus Act definitely enacted that every man accused of crime, except treason or felony, could obtain such a writ and must be tried within twenty days of the time of the writ.

The appointment of impartial judges was secured by the Act of Settlement (1701). Previous to that Act, the judges had been nominated, and could be dismissed, at the pleasure of the King. In consequence they were only too often the creatures of the King. The decisions obtained in the courts by the Stuarts (for example Hampden and Ship Money) afford eloquent evidence of this fact. The independence of the courts was assured by the above Act, which stated that judges were to hold office *quamdiu se bene gesserint*—as long as they behaved themselves.

These two statutes form the very foundation of the personal liberty of every individual.



## CHAPTER IX

### LOCAL GOVERNMENT

**Definition.**—Local Government is the conduct of public business in a given area by a body of people elected by the inhabitants of the area to carry out the requirements of the Central Government and to deal with all matters relating to the government of that locality. They are known as “local authorities”. Examples of such areas are counties and boroughs.

**Its Importance.**—In passing from central government to local government, it must not be supposed that we are passing from the intrinsically more important to the less important. To begin with, as our definition itself indicates, there cannot be, in fact, any separation between the two. Many of the laws directly affecting our lives are passed by Parliament but are put into operation by local authorities. Moreover, for reasons explained more fully towards the end of this chapter, the value of local government is certainly an increasing value.

Further, the educative value of local government is undeniable. In central government the citizens elect a Member of Parliament at relatively rare periods, in the intervals between which they lose active touch with him and therefore, in spite of the prevalence of the modern newspaper, tend to lose personal touch with the Government. But the citizen is in vital touch with local government, not merely spasmodically, but continually. There he is able to see the work of government actually carried on, and hence is made to feel constantly some sense of responsibility for contributing his share to the common weal.



**Functions.**—It hardly needs saying that local government is concerned with matters in which the interests of each locality are more or less sharply differentiated from those of other localities or of the country as a whole. Such matters are those relating to sanitation and poor relief.

But in this connexion certain considerations need to be borne in mind. To begin with, because people do not live confined to separate districts, as if to water-tight compartments, the effect of local government cannot be limited exclusively to the separate localities. Thus, any district which neglected to enforce sound principles of sanitation would invite infectious diseases. These diseases, however, could not be limited to the particular area responsible: they would certainly spread to contiguous areas, and by the carriage of germs would probably infect even distant places. Further, it is desirable—and in some matters even essential—that measures of local government should be fairly uniform throughout the country. In Poor Law relief, uniformity is especially necessary: the injustice of the poverty of one area being relieved on a scale more generous than that elsewhere is too obvious to need emphasis, not to mention the temptation for the poor in less favoured areas to drift towards the more favoured. For such reasons as these, it is both just and advisable that the central government should supervise, and perhaps exercise some measure of indirect control over, local government authorities.

## 1. ITS HISTORY

We have seen that the earliest form of government was necessarily local government exercised through the shire, the hundred, and the township or vill (roughly



corresponding to the present parish). Then, following the Norman Conquest, the deliberate tendency was to strengthen the central government and to weaken the organs of local government as such, that is, except in so far as they became merely the media of the central government. This tendency continued until the Tudors, who, with their almost intuitive grasp of sound polity, seized upon the parish as the natural and convenient unit for administration. An outstanding example of this was the great Poor Law enacted right at the end of the Tudor period (1601). This Act made each parish responsible for its own poor.

From that point onwards more and more governmental work was carried out through the agency of local government. At first this process was very slow, but later the pace quickened to such a degree that, before the end of the nineteenth century, a vast amount of work had been delegated to local authorities.

**Need for Reforms.**—Unfortunately this had been done in a piecemeal, haphazard fashion. Each time some new power was conferred on a local authority, a new authority was erected to exercise the power. Worst of all, there was considerable and ever-increasing overlapping of the geographical boundaries of these authorities, so that any particular individual might be linked with one place for one purpose and with a number of different places for as many different purposes. The result was chaos. In addition to the natural divisions of counties, parishes, and boroughs, there were sanitary, education, poor law, highway, improvement act, burial, and other districts. It has been stated that "in 1883 there were no less than 27,069 independent local authorities taxing the English ratepayer, and taxing him by eighteen different kinds of rates".<sup>1</sup> It was this chaos

<sup>1</sup> Sir J. A. R. Marriott, *The Mechanism of the Modern State*, Vol. II, p. 354.



that the Local Government Acts of 1888 and 1894 sought to reduce to order.

**Local Government Acts, 1888 and 1894.**—This was done by making the Parish the unit of local government administration, the Parishes being grouped together into Districts (Urban and Rural), the Districts being grouped into Counties. A little time was necessary during which the various adjustments, directed by the Acts, had to be worked out in detail and finally put into operation. But, when once this was achieved, the resulting orderly relationship of the various authorities to one another brought to an end the various anomalies of overlapping and general confusion.

The only exceptions to the above uniform system are the boroughs. These are of two classes, County Boroughs and Municipal Boroughs. County Boroughs (mostly boroughs with a population over 50,000) are responsible for all their local government, being in this respect in an exactly similar position to that of the counties. The non-county boroughs are, administratively, within the county, having representatives on the County Council, and are thus responsible for only a part of their local government: for example, a county borough, like a county, manages all its education, secondary as well as elementary; but a municipal borough manages only its elementary education, the secondary coming directly under the Council of the county in which the borough is situated.

**Local Government Act, 1929.**—The provisions of the Acts of 1888 and 1894 were modified in several important particulars by an Act of 1929 which, however, left unaltered the general scheme of Local Government as established by the earlier Acts.

The object of the 1929 Act was to remove from Local Government certain defects resulting from the enormous



changes in the conditions of life which had taken place during the generation subsequent to 1894. These defects were mainly three. First, the areas and functions of the Poor Law Guardians frequently overlapped those of other authorities. Second, under the earlier Acts the lesser local authorities—that is, those below the counties—had been responsible for the maintenance of certain classes of highways. But the great growth of road-traffic, especially during the decade immediately prior to 1929, meant that increasingly heavy charges for the upkeep of the roads fell upon the local highway authorities, although most of the traffic did not directly benefit the locality concerned. The third defect was financial. To begin with, the system of rating was felt to hit industry, especially agriculture, unfairly. Further, the particular system under which grants were made from the National Exchequer towards local expenses, often meant that the relatively wealthy authorities, engaged in expensive undertakings on a large scale, received large sums, whereas the grants were least where the need was greatest. The exact provisions of the 1929 Act, in each of these three particulars, will be dealt with in the course of this chapter.

We now proceed to deal with each of the local government authorities in order.

## 2. THE COUNTY

The counties are, for the purpose of local government, the geographical counties less the county boroughs. There are certain exceptions to this rule: though most geographical counties have a county council, some have more than one. York and Lincolnshire, for example, are divided into three administrative areas, each area having its own council. London also ranks as a county.



Thus, though there are fifty-two geographical shires, the 1888 Act created sixty-two administrative counties. County boroughs are responsible for their local government in the same way as the counties themselves, so the following description of the administration of a county applies equally to a county borough.

**County Council.**—The County Council consists of Councillors, Aldermen, and a Chairman. The councillors are elected by ratepayers, both men and women, for three years, at the end of which time the whole body of councillors retires. The number of councillors varies, according to the size of the county, from twenty-eight to one hundred and forty. The aldermen are chosen by the councillors either from among themselves or from persons qualified to be such. Their number must not exceed one-third that of the councillors, and they are selected usually as a recognition of long public service. Aldermen hold office for six years, one-half of them retiring every three years. Thus, in every new council there is a nucleus of aldermen with ripe experience of county administration. The chairman also is elected by the other members of the council. He too is usually already a member of the council, but the latter has power to elect someone outside.

**Functions of Council.**—The functions of the County Councils are extremely varied. Even previous to 1929 they controlled the county police; maintained all schools, both elementary and higher, reformatory and industrial; administered public health regulations; and constructed and repaired roads and bridges. The effect of the 1929 Act has been to extend these functions very considerably by transferring to the County Councils powers previously exercised by lesser authorities. This is true in two principal directions, namely, the administration of the Poor Law and the maintenance of roads.



**Poor Law.**—The general effect of the 1929 Act in respect of the Poor Law was to abolish the Poor Law authorities, as existing on 1st April, 1930, and to transfer their powers to county authorities, that is, to county councils and county borough councils. If a Poor Law Union was in the areas of more than one county authority, its functions were divided among the county authorities involved. The Act further provided that each county should set up a "Public Assistance Committee" to carry out its Poor Law responsibilities. One-third of the members of this Committee may be co-opted, and some of the co-opted members must be women.

Each district of the county has a district committee of the Public Assistance Committee. In county boroughs these are sub-committees of the borough councils. But in the counties, they are called "Guardians' Committees", each such committee consisting of the local representatives on the county council, together with certain borough or district councillors—appointed by the councils of which they are members—and members co-opted by the county council.

It is these Guardians' Committees which actually consider applications for relief, and fix both the amount of the relief and what proportion of the expense is to be recovered from the person concerned. For the relief which the Guardians' Committees have power to grant is wider and deeper than mere monetary allowances to cases of extreme poverty, and includes such matters as medical and surgical treatment, for which permanent institutions may be necessary. The local authority has power to recover, from the person treated, the whole or part of the expenses incurred by treatment, the actual amount recoverable being fixed according to the circumstances of the individual concerned.



**Roads.**—Broadly speaking, and leaving aside some minor exceptions, the county also became the authority responsible for the maintenance of public roads. As such, it took over the powers previously exercised by District and Parish Councils in respect of highways. The chief exception is that an Urban District Council with a population of at least 20,000 may claim to retain the powers it held over highways according to previous Acts.

The efficient discharge of such duties involves heavy expenditure, for which purpose the councils have power to levy county rates.

The county council's work is so multifarious that, in order to accomplish it, the council divides itself into committees, each committee being assigned one section of the work of the council such as poor law and roads—as indicated above—and also public health and assessment. Every councillor is a member of one or more of these committees. The full council meets relatively rarely, usually about four times a year, and then its work consists largely of receiving the reports of its committees, whose decisions it discusses and adopts, modifies or rejects. In this way every member has a real and active share in county administration, and that administration is carried out much more efficiently than if the whole council had to deal with every detail of every branch of its business.

**Permanent Officials.**—Much of the work of administration demands continuous service of a highly trained and skilled nature. For such service the council engages permanent officials, each one of whom is usually in charge of a department of clerks or workmen. The most important officials are the Clerk, who is the legal adviser and the secretary of the council; the Treasurer; the Surveyor; the Director of Education; the Inspector of



Weights and Measures; and the Medical Officer of Health.

This outline of county administration should simplify our study of the other local government units: in principle the organization of these is identical with that of the county.

### 3. DISTRICTS

**Urban.**—An Urban District is, in theory, a division of a county comprising a populous place other than an incorporated town. The council of an urban district does not contain aldermen and is elected for three years: in some cases the urban district councillors all retire together, in others one-third of them retire every year. They elect their own chairman, who becomes *ex officio* a county Justice of the Peace.

The work of an Urban District Council consists largely of carrying out National Health Acts. In addition to this, however, it has power to exercise functions and to maintain public services similar to those exercised and maintained by a municipal borough council. Thus, when the population of an urban district reaches 20,000, its council becomes responsible for elementary education.

**Rural.**—Those parts of a county remaining after excluding the boroughs and the urban districts are divided into rural districts. The functions of their councils are similar to those of the urban districts, that is, they are concerned chiefly with public health, but they do not control education.

### 4. THE PARISH

**Origin.**—"Parish" was originally the name of an area pertaining to a church, that is, it was a division of a diocese. By about the tenth century the whole of



England had been parcelled out into parishes. Now, because for a lord to build and endow a church on his manor was regarded as a pious act, and because a township or vill usually had a church of its own, the parish tended to be coterminous with the manor or vill. This did not hold good universally, the boundaries sometimes being quite different so that there was considerable overlapping, any given village being not infrequently split up among several parishes. But the coincidence of the two was common enough for the parish to be thought of as both an ecclesiastical and a civil unit, and, as we have seen, it became increasingly used for local government purposes from the Tudor period onwards.

**1894 Act.**—The District and Parish Councils Act of 1894 sought to make the parish responsible for its own administration. By that Act, every parish must have a Parish Meeting of ratepayers. In the smallest parishes this meeting directly carries out the provisions of the Act. But every parish with a population of three hundred or over has a Parish Council of from five to fifteen members, according to the size of the parish, elected annually by the ratepayers. Parishes with a population less than three hundred may be grouped together under one council or be given a separate council at the discretion of the county council.

The powers of the parish council are, in the nature of the case, not extensive, the important public needs being met by the county or the district. The parish is, however, responsible for maintaining public footpaths not at the side of public roads, the lighting of roads, and, where desired, the erection and maintenance of public parks and libraries. To the parish were also transferred most of the civil functions of the vestry and the power to appoint overseers. Both of these terms call for a word of explanation.



The *Vestry* is the name of the meeting of ratepayers of a parish held in the church vestry with the clergyman as chairman. This meeting once controlled all parish business. The effect of the 1894 Act was to hand over the civil business, such as the disposal of parish charities, to the parish council, leaving to the Vestry only the control of church matters, as, for example, the care of church fabric and the appointment of church-wardens.

The office of the *Overseer* dates back to the reign of Elizabeth. The Poor Law of 1601, recognizing that the state was responsible for the care of those unable to care for themselves, made the parish the unit for the dispensation of state help. In other words, each parish was made responsible for its own poor. To this end the Justices were to appoint in every parish two or three overseers to levy a tax on the inhabitants of the parish for the relief of the poor. Ever since that time, one of the chief features of the parish has been its existence as a Poor Law unit. Since 1894 the appointment of overseer for the parish has been in the hands of the parish council itself. The expenses of poor relief and of the upkeep of the other parish undertakings were defrayed out of the Poor Rate, which was levied by the overseers. As explained above, the administration of the Poor Law has been considerably modified by the Act of 1929.

## 5. THE BOROUGH

We have seen that the municipal borough, as distinct from the county borough, forms part of the county in which it is situated. Yet, strictly speaking, a borough stands outside the uniform scheme of reformed local government—parish, district, county. Much of its public business it conducts itself through the medium of the town council consisting of the mayor, aldermen, and



councillors. The right to do this is conferred by the King in a Charter of Incorporation. Sometimes the charter invests the town with the title of "City". Originally this title was restricted to places where there was a cathedral, whether boroughs or not. But to-day, though every cathedral town is a "city", that rank has been conferred also on large towns without a cathedral. Actually the difference is one of name only. "City" is regarded as being a more dignified title than "borough", but the powers of a city council are identical with those of a borough council.

**Borough Council.**—The councillors are elected by the ratepayers for three years. One-third of them retire each year and therefore their number is usually, for the sake of convenience, a multiple of three. As in the case of county councils, the size of the council varies with that of the borough: in the smallest there is a council of nine, in the largest the membership may be as high as a hundred. The number of aldermen is one-third that of the councillors. They are chosen by the councillors to sit for six years, one-half of them retiring every three years.

**Mayor.**—On the ninth of November the council elects the mayor for the ensuing twelve months. In practice he is almost invariably an alderman or a councillor, though he may be anyone outside the council provided he would be eligible for membership if elected. The mayor acts as chairman of the council and, by virtue of his office, becomes a Justice of the Peace for the borough during his mayoral year and for the next year. Upon the mayor falls the duty of representing the town on all official occasions, and he is expected also to offer considerable hospitality within the borough itself. All this involves heavy expenditure, and as the mayor, in common with the rest of the council, is unpaid



he is always out of pocket at the end of his year of office. In some towns grants are made towards these expenses, but, even so, the expenses always exceed the grant and often do so considerably.

**Work of the Borough Council.**—The work entrusted to the borough consists of the maintenance of those public services which do not directly affect other parts of the county. This the council does by sub-committees of its members. Any borough with a population of over 10,000 is entitled to a separate police force, though many boroughs find it more economical to be included in the county for this purpose. Where there is a borough police force it is supervised by a watch committee. Also, in boroughs of over 10,000 inhabitants, the council is responsible for its own elementary education: this will necessitate a further committee. There will also be a highways committee to maintain the roads; and similarly with the other administrative work. In most boroughs the essential public services, such as water and artificial light, are organized by the council directly. Municipal libraries, art galleries, baths, and houses are also to be found in many towns. Many boroughs have carried municipal trading much farther than supplying the necessities and semi-necessities of life. Not uncommonly boroughs run omnibus and tram services, and even in one or two instances open municipal banks. All these services are looked after by an appropriate committee of the borough council.

The trading services should be at least self-supporting financially. For the maintenance of the others the council has power to levy rates.

**Permanent Officials.**—The Town Clerk is the legal adviser of the council. As in the county, each administrative department has a salaried official at its head. In a borough, these are usually more numerous than in a



county on account of the larger number of public services.

## 6. CENTRAL CONTROL

At the outset of our survey of local government, we said that, in order to secure efficiency and uniformity of administration throughout the country, it is essential that the central government should supervise and, in the last resort, control the local government authorities. The above sketch of the multifarious functions of the various councils and their officers should make the necessity for co-ordination even more clear. The department of the central government responsible for this work is the Ministry of Health, which has absorbed the former Local Government Board.

The Ministry exerts its control in two ways. First, each of the local authorities exists for the definite purpose of carrying out specific functions detailed in, or under the provisions of, an Act of Parliament. That is to say, Parliament lays down general principles, for the most part, and relies upon the authority to which they are delegated to administer them in local conditions. Some of these duties are statutory, others are permissive; that is, some are compulsory on local authorities, while others are optional. Thus the operations of each council are restricted within expressly prescribed limits. Only very exceptionally are those limits defied.

The other weapon at the disposal of the Ministry of Health is financial. The Ministry's sanction is necessary to enable any council to borrow money. This means in practice that for every undertaking at all out of the ordinary routine the Ministry has a controlling voice. Moreover, the accounts of all local government bodies, except boroughs, are subject to the audit of the Ministry, which is thus able, not merely to direct the adoption of



a certain course, but also to ascertain whether its directions have been duly carried out. Further, the cost of many public services is substantially aided by the central government. Hence, in the event of a council's failure to conform to regulations or to maintain those public services at a requisite standard, the central government has the reserve power of withholding grants. For example, the Board of Education makes grants to the local councils towards the upkeep of schools. Any school whose efficiency fails to satisfy the Board's inspectors becomes ineligible for grant. The mere possibility of the withdrawal of such a grant is usually sufficient to induce the council to carry out its administrative functions with reasonable efficiency.

**Grants to Local Authorities.**—This leads us to our last subject in connexion with local government, namely that of the actual method of grants by the central government to local authorities, which was the third of the defects that the Local Government Act of 1929 sought to remedy. In order to understand the reason for the system of grants then set up, we must first notice that one effect of that Act was to decrease considerably, in two directions, the income derived by the local authorities from rates. First, agricultural land and buildings were exempted from all rates. Second, premises used for industrial purposes, or for freight transport purposes, became ratable at one quarter of their annual value: this, of course, gave especial relief to railway companies. The object of this clause was, mainly, that the industrial and transport firms should pass on their relief to their customers. Accordingly, the Act contained definite provisions whereby the carriage-charges on certain classes of goods were reduced, so as to benefit the industries concerned with those goods, mainly agricultural and mining.



The effect of these de-rating clauses was calculated to be a loss in rates of £24,000,000 per annum. That loss had, of course, to be made up to the local authorities by the central Exchequer. The principle on which the compensation was made was, as already indicated, that it should correspond not to the expenditure but to the needs of each local authority. Hence the system of grants, proportionate to local expenditure, ceased. Its place was taken by a system of block grants calculated first for a three-year period, then for four years, and thereafter for five-year periods. The basis of this grant to each authority at first was to be the actual amount of loss incurred by the authority through the de-rating system. But, increasingly, at each re-calculation, more and more weight was to be given to the needs of each county as indicated by the following three factors: the proportion of children to adult population; the number of its unemployed insured men relative to its total population; and the estimated population per mile of roads.

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## CHAPTER X

### THE CONSTITUTION OF THE EMPIRE

No story of the British Constitution would be complete without some account of the government of Greater Britain beyond the seas. The history of each of the colonies and dependencies is outside the scope of our study. Yet the principle which led us to trace the growth of the British Constitution in order to understand its present working, applies no less forcibly to the Constitution of the Empire. For the governmental



system of any given colony, and the relationship of that to the homeland and to the Empire as a whole, are so clearly the product of history that some survey of Imperial development is essential.

To simplify our study, we shall trace the constitutional stages of one colony, and shall then show that the other colonies have, in principle, passed through similar successive stages of governmental development. The colony which is thus to serve as the illustration is Canada, partly because Canada is one of the oldest colonies still within the Empire, and partly because the governmental stages through which Canada has passed have been so clearly defined.

## 1. CANADA

**Quebec Act, 1774.**—Canada as a whole first became a British possession with the fall of Montreal in 1760 during the Seven Years' War, and was formally ceded to us by the French in the Treaty of Paris of 1763. It then consisted of the Province of Quebec with a population of some 65,000 French, and for some time was ruled by a military governor. Not until 1774 was its government established on a regular basis. The Quebec Act of that year provided, among other things, that the Colony was to have a Council with power to pass legislation, but the members of which were to be nominated by the Crown.

This Act was hardly dry upon the Statute Book before a completely new situation arose in North America: 1775 saw the outbreak of hostilities between Britain and the revolting colonies, leading to the war of American Independence. That the Quebec Act had given satisfaction to the French colonists is demonstrated beyond dispute by their refusal to support the revolting colonies



in spite of repeated efforts to induce them to join in the quarrel. Nevertheless, the struggle of the thirteen colonies for independence had upon Canada an effect which no one could have predicted: during and after the War, considerable numbers of loyalist colonists, that is, colonists who wished to remain under British rule, emigrated northward into Canada, settling mainly in Upper Canada (Ontario), but also in Nova Scotia. The resulting problems were prodigious. There were complications in respect of language, law, religion, and temperament; but, more than these, it would be manifestly unfair for the loyal immigrants to be appreciably worse off politically than if they had remained in the United States. Yet the French of Quebec were totally unaccustomed, both by tradition and by their own experience, to self-government.

**Canada Act, 1791.**—The actual solution attempted was formulated in the Canada Act, by which Upper and Lower Canada were separated. In each colony, Ontario and Quebec, there was to be a Governor appointed by the Crown; a Legislative Council, also appointed by the Crown and corresponding in functions somewhat to the British House of Lords; and a House of Representatives elected by the people. According to this constitution, however, the executive officials were responsible, not to the Representative Assembly, but to the Governor, so that, in the last resort, the people's representatives had no real control over the Government. This state of affairs, in which the people had representation without responsibility, needed only some political crisis to produce an outburst of ill-feeling and possibly of armed revolt. Such a revolt actually occurred in both provinces in 1837, and discontent with the irresponsibility of the Executive, though not the sole cause, lay at the root of the trouble.



To deal with the immediate disturbances, but even more to devise means for avoiding a recurrence of similar discontent in the future, the Home Government sent out Lord Durham. The unfortunate false moves of Durham, due mainly to his own impetuous temperament, do not concern us. But what is of an importance impossible to exaggerate, is that he drew up his proposals in the form of a *Report* published in 1839. The significance of this document is not merely that it solved the immediate problems of Canada, but that that solution became the model for colonial government throughout the Empire.

**Reunion Act, 1840.**—Lord Durham's Report was incorporated, almost as it stood, in the Reunion Act which, as its name implies, reunited the two Provinces of Ontario and Quebec. What is of immeasurably vaster consequence is that the new Constitution of Canada, though similar in form to the previous Constitution of each of the two separate Provinces, resulted in practice in the Executive's being fully responsible to the Representative Assembly. Thus was complete Responsible, as distinct from mere Representative, Government established in Canada.

**British North America Act, 1867.**—Yet once again a new situation presented itself to show that even this could not be the final word in Canadian Government. The rapid development of wide areas outside Ontario and Quebec, especially in the great middle west of the continent, with the accompanying growth of population, made the colony impossibly unwieldy for government from any one centre. Yet to split the colonies up into entirely separate, disconnected units would be fatal. This dual problem was solved by Federation.

The British North America Act established the



*Dominion of Canada* with a Constitution formed on the model of that of Great Britain. The Governor-General, representing the King, appoints life members to the Senate, each Province being entitled to a certain number of its residents in the Senate. The House of Commons consists of members elected—for five years—from the whole Dominion, the number sent from the respective Provinces being proportionate to their population. Each Province has a Lieutenant-Governor, appointed by the Governor-General, a Council, and an Elected Assembly. The exact relationship of the colony to the Home Government will be dealt with later.

**Constitutional Stages.**—A review of the story of Canada thus briefly indicated, shows that the colony has passed through four distinct constitutional stages, each one being marked by an Act of Parliament. Under the Quebec Act government was retained in the hands of the Crown, acting through a Governor and Council both appointed by the Crown: that is *Crown Colony* government. The Canada Act provided for a House of Representatives, but, as these had no ultimate control over the Executive, the government was *Representative* only. After the Reunion Act, the Executive became fully responsible to the representative assembly, thus establishing *Responsible* government. The final stage was reached by the *Federation* of the separate provinces into one Dominion. Stages similar to these can be traced in the evolution of every colony. Some colonies have passed successively through all of them, as for example Australia. Some, like Gibraltar, remain Crown Colonies. Others again, with full responsible government, have no need, because their territory is small or because their population is homogeneous, of a system of federation. To keep in mind the respective stages of colonial development, illustrated historically by



Canada, is a most useful guide in studying the government of the colonies.

## 2. OTHER SELF-GOVERNING DOMINIONS

**Australia.**—The story of the colonization of Australia is, in one respect at least, the simplest that we have to follow. For in Australia there was no problem either of rival Europeans or of a native race. The claiming of Australia as a British possession by Captain Cook in 1770, and the subsequent transportation of convicts thence after the independence of the American Colonies, is too well known to need retelling in detail here. Suffice it to say that the first batch of convicts was sent to New South Wales—which then included the whole eastern seaboard—in 1787, and these, when their sentences expired, were given land on which they settled. These discharged convicts formed the nucleus of the colony, and, though other settlers went out, the military governor administered the whole colony. After 1823 he had an Advisory Council, the members of which were all either officials or nominated, so that the administration was that of a *Crown Colony*. In 1840 came a change: that year saw the abolition of the transportation of convicts, which gave a great impetus to the immigration of free settlers and so very soon changed the character of the colony. This was reflected in its government. In 1842, after the example of Canada, a Legislative Council of thirty-six was established having two-thirds of its members elected, thus marking the introduction of *Representative Government*.

In the meantime colonization had been developing from other centres—Western Australia in 1829 and Southern Australia in 1834. The gold discoveries beginning in 1849, with the consequent influx of popula-



tion, led to Victoria's being separated from New South Wales in 1851. Queensland, originally settled in 1826, was similarly separated from New South Wales in 1856. The Imperial Government in 1850 empowered the colonies to draft constitutions for themselves and to submit them for approval. This was done, and in 1854 *Responsible Government* was established in the colonies, each of which had two Houses, the ministry being responsible to the elective assembly.

Two factors led to the *Federation* of the colonies. First, the marked increase of population produced many problems—for example, of communications and tariffs—which could be dealt with effectively only by a central authority. Second, the growth of French and German power in the Pacific raised the question of defence. Accordingly, after prolonged negotiations between the colonies themselves, and between them collectively and the Home Government, in 1900 a Federal Constitution was established. This Constitution allows the individual states to retain most of the powers they already exercised, to have their Governors appointed directly by the Imperial Government (not by the Federal Government), and to communicate separately with the Colonial Office. In all of these three respects the Australian Constitution differs from that of Canada. The Federal Government consists of a Governor and two Houses of Parliament. The Upper House or Senate consists of members elected for six years by the people, all the states having an equal number of members, half of whom retire every three years. The Lower House or House of Representatives consists of members elected—for three years unless dissolved earlier by the Governor—by the people, the number allotted to each state being proportional to its population. The powers of the Federal Government include those of taxation, customs, coinage, and defence.



**New Zealand.**—In New Zealand, government on the one hand was complicated by the presence of a virile native population, but on the other was simplified by the smaller extent of the country and by the fact that the colony was able to benefit by the experience of the older colonies of Canada and Australia.

Though the Governor of New South Wales supervised, as early as 1817, such settlers as there were in New Zealand, no permanent governmental settlement was made until 1840, when a separate Governor with a nominated Council was appointed. The succeeding years saw much trouble between the white colonists and the natives, and some friction between the colonists and the Home Government. With these events we are not concerned. Finally, in 1852, a constitution granting *Responsible Government* was agreed upon. This followed lines similar to those of other colonies: a Governor; an Upper House, whose members are nominated by the Governor; and an elected Representative House. A noteworthy feature of the elected Assembly is its inclusion of four native (Maori) members elected by the natives themselves. Thus New Zealand took a short cut direct from a Crown Colony to Responsible Government, so avoiding altogether the stage of Representative Government.

**South Africa.**—If the New Zealand problem of government was complicated by the presence of natives, that of South Africa was trebly complicated. For not only did the natives far outnumber the white population—as indeed they still do by many times—but the native population was itself made up of many varying races and tribes unceasingly hostile to one another and even more so towards the whites. Add to this the fact that the Boer farmers had been at the Cape long before the advent of the British and grew more and more restless



under British control, and it is easy to understand that the difficulties of government can hardly be exaggerated. We must do our best to disentangle the main lines of progress.

Cape Colony finally came into British hands by arrangement with the Dutch Government in 1814, after the Napoleonic War. As it was regarded simply as a port of call and as a military depot on the way to India, its earliest administration was in the hands of a military Governor. In the succeeding years troubles fell thick and fast on the colony, during which period the fierceness of the native tribes and the obstinacy of the Boers were matched by the vacillation of the Home Governments. In 1836 the Boers began to trek northwards out of Cape Colony, and so formed new settlements on the Orange River and the Transvaal. To protect the frontier of Cape Colony from invading natives, Britain annexed these territories temporarily between 1877 and 1881, but apart from this the Boers maintained their independence until after the Second Boer War of 1899-1902.

In the meantime, *Representative Government* had been granted to Cape Colony in 1853, when two Legislative Houses were established—both elected—but to which the ministry was not responsible. *Responsible Government* was not long in following: in 1872 this was established on lines similar to those of Canada and Australia. Within five years of the Boer War, Responsible Government was granted to the Transvaal and the Orange River Colony (1907). The relationship of Natal to Cape Colony is a separate story. Our present purpose will be served by saying that, after being annexed by Britain in 1843, Natal was administered by Cape Colony until 1887 and was granted Responsible Government in 1897. Thus by 1907 there were four colonies in South Africa



with full self-government. It is not surprising that attention should next be turned towards a Federation of these colonies. After protracted negotiations between the parties concerned, and with the Home Government, agreement was finally reached and found expression in the *Act of Union*, which came into operation in 1910. The title of this Act reflects truly the fact that the separate colonies were not merely federated together but were united. That is to say, with the establishment of the Union Parliament, consisting of two Houses, the Parliaments of the constituent states ceased to exist. Each province has a Provincial Council, but this has very small powers, so that, unlike the Constitutions of Canada and Australia, there is no division of functions between the central and provincial Legislatures: in South Africa there is only one Legislature, this having unfettered power to legislate for the whole Union.

**Ireland.** — A newcomer to the ranks of the Dominions is Ireland. In December, 1921,<sup>1</sup> the Irish Free State became a Dominion, and so came under the control of the Colonial and Dominions Office, the work of the Irish Office in London being taken over by the latter Department. At first, the work of reorganization, especially under the particular circumstances of the establishment of the Free State, was exceptionally difficult and exacting. But gradually the administration has been assimilated and brought into line with that of the other Dominions.

### 3. CROWN COLONIES

The great self-governing colonies with which we have dealt above form the larger and characteristic part of

<sup>1</sup> Chapter VI: Scottish and Irish Members.



the British Empire. But the Empire contains also a large number of other possessions dotted over the whole face of the globe. Of these, India is so immeasurably the greatest, both historically and in its present problems of government, that we shall reserve it for separate treatment. The remainder of the Empire consists of smaller islands and territories governed as Crown Colonies.

It would be quite beside our present purpose to enumerate all the Crown Colonies or to give details of the methods of government of each of them. There are, however, two general factors which need to be borne in mind.

**Varieties of Government.**—First, the conditions affecting government vary so enormously from colony to colony that no one hard-and-fast system is equally applicable in detail to all of them. Thus, Gibraltar contains almost no English population apart from the garrison. Consequently the administration is in the hands of the Governor, who has not even an advisory Council. Other British possessions have nominated Councils to advise the Governor; while yet others, such as Malta, with a larger European population, have an Assembly some of the members of which are elected. Such an assembly can advise the Governor but, in the case of a difference of opinion, cannot control his policy.

**Common Tendencies.**—Second, in spite of these differences, one fact tends to reduce the governmental methods in the colonies to one or other of two systems—either to Crown Colony Government or to full Responsible Government. Repeatedly, and in a number of different colonies, the Imperial Government has tried to give to a colonial population a real share in government, but without making the colonial ministry responsible to the elected assembly: in other words,



colonies have been granted Representative as distinct from Responsible Government. Almost without exception that system has broken down. As soon as there has arisen any vital issue upon which the popular representatives have disagreed with the ministry, acute dissatisfaction has been provoked and has resulted either in the refusal of the representative assembly to co-operate further with the Government or in open rebellion. Indeed, in more than one instance Representative Government has had to be withdrawn and the colony concerned, instead of progressing farther to full Responsible Government, has reverted to the earlier status of a Crown Colony.

Thus, though there are differences in the details of government, most of the British colonies without Responsible Government are Crown Colonies administered by a Governor usually with a Council—on which there may or may not be a representative element—and by a body of permanent Civil Servants sent out from England.

**Protectorates.**—A passing reference should be made to another class of states which have a somewhat peculiar relationship to the British Government, namely, those known as Protectorates. A Protectorate is a state which, so far as its internal administration is concerned, is governed by its own ruler but which cannot have dealings with outside powers except through, or with the permission of, a suzerain under whose “protection” it stands. A country may be declared a Protectorate of Britain either because it is being developed by a British chartered trading company which—in the interests both of the natives and of the company itself—ought to be brought under the influence of the British Government, or because the internal condition of the country in question is such as to threaten the good



order of British territories on its borders. Nigeria is an example of the former cause and Egypt of the latter.

#### 4. INDIA

India stands in an unique position among the members of the Empire. This is due partly to the history of the relations between Englishmen and the various Indian states, and partly to the peculiar conditions prevailing in India itself—religious, racial, economic, and historical.

**History.**—The story of the English in India dates back to the granting of a royal charter to the East India Company in 1600. The Company soon discovered that successful trading necessitated actual interference with native states: depôts were needed and, in the early days of rivalry with the French, the favour of native princes was not merely desirable but indeed essential. In a word, trading operations made political control inevitable. Hence, by the end of the career of Robert Clive (1767) a trading company had become responsible for the administration of wide tracts of Indian territory.

The anomaly of this position allowed, if it did not actually encourage, all kinds of irregularities. Among other things, it put a great strain upon the integrity of the servants of the Company in India. To redress these evils as far as possible, and to put the Government of English possessions in India on a more satisfactory basis, Lord North's Government carried through the *Regulating Act* of 1773. This made the Governor of Bengal the Governor-General of India, established a Council of four to assist the Governor, and set up a Supreme Court to administer law. It was under the provisions of this Act that Warren Hastings was Governor-General from 1774 to 1786.

In practice, unfortunately, this Act did not operate



as successfully as was hoped. The Governorship of Hastings afforded numerous examples that the relationship of the Governor to his Council on the one hand and to the Supreme Court on the other hand, left much to be desired.

A remedy was attempted in *Pitt's India Act* in 1784. This Act established in London a "Board of Commissioners for the Affairs of India"—a body commonly known as the "Board of Control"—composed of a President together with the Chancellor of the Exchequer, a Secretary of State, and four Privy Councillors. The Government appointed the Governor-General and the higher officials, and became responsible for general Indian policy. Under the provisions of this Act, India was governed until the Mutiny (1856-8) irrecoverably changed the whole relationship of India and Great Britain.

**Lord Derby's Bill, 1858.**—There can be no doubt that one of the root causes of the Mutiny—perhaps *the* cause—was the new conception, to which Lord William Bentinck (1828-35) was the first Governor-General to give definite expression, as to the functions of the British Government in India. He insisted that, in so far as Britain had any right to exercise government in India at all, the only justification was that she governed in the interests of the governed, that is, of India and the Indian. Accordingly he began a policy of reforms having as their object the amelioration of the lot of the native. Lord Dalhousie (1848-56) carried this principle even farther and introduced or extended many Western ideas and practices—for example, education and railways. The truth was, however, that the native was not yet ready for these innovations. To the easterner, religion is not merely something he adds to his other activities without much affecting his ordinary life: religion is



that by which he lives. His religion is his life, so that it is impossible to touch his life at any, even the most minute, point without touching his religion. The Indians' final protest against what they considered to be violations of all the religious traditions of their race was the Mutiny. That in itself does not now concern us further. But two aspects relative to this question must be understood. First, a constant recollection of the force of religion is an absolute necessity to any understanding of the native question in India. Second, the conception that Britain is in India for the good of the Indian was not killed by the Mutiny. On the contrary, from that time onwards it has been the unswerving policy of the British Government to give native Indians a real share in the government of their country as, through education and experience, they become increasingly fit to exercise it. In other words, the policy is to grant wider and wider powers of self-government until India is ready for full Responsible Government within the Empire side by side with Canada, Australia, New Zealand, and South Africa.

This aim found some expression in the new system of Indian government instituted by the Act of 1858, by which the Government became directly responsible for administration. A Secretary of State for India was to be at the head of a Government Department and was to be advised by a Council of fifteen, all the members of which were to have real knowledge of Indian needs and conditions. Eight members were nominated by the King, and seven chosen by the Directors of the Company. Henceforward the Governor-General was to be entitled "Viceroy" and was to have a Council, the legislative part of which consisted not only of officials but also of European and native members to represent the views of the people generally. Here, then, we have



the real beginning of the Indian's helping to govern himself. The logical consequence of the 1858 Act came in 1877, when, at the great Indian Durbar at which the Prince of Wales (later King Edward VII) was present, the Queen was proclaimed Empress of India. Under this scheme, with a few modifications in detail, India continued to be governed for forty years.

Throughout that period the general policy was that of educating the Indian so that he might ultimately be fit to govern himself. One significant indication of this is afforded by the gradual change in the status of India on the Colonial Conferences, to which further reference will be made in the course of this chapter.<sup>1</sup> At the Conference of 1887 the Secretary of State for India was present for the formal opening only. In 1897 and 1902 India had no representative. In 1907 the Secretary of State was present at the opening and a member of the Council at some of the later meetings. The Imperial Conference of 1911 was attended by the Secretary of State, while, at the Imperial War Conference of 1917, India had no less than five representatives—the Secretary of State, another Englishman, and three outstanding Indians. Of the Treaty of Versailles, India was a signatory, and she is also a member of the League of Nations.

**Government of India Act, 1919.**—This, however, is anticipating the stages of our story. In 1919 a new Act was introduced. It was based upon the Report of Mr. E. S. Montagu, the Secretary of State for India, and of Lord Chelmsford the Viceroy, and it came into force in 1921. Under its provisions, the Central Government of India consists of two assemblies: the Legislative Assembly and a Council of State. The former

<sup>1</sup> For the following details I am indebted to Sir Malcolm Seton's *The India Office* (Putnam, 1926).



has altogether 143 members, 104 of whom are elected, the remainder being partly officials and partly nominated non-officials. The Council of State contains thirty-three members elected—but on a narrower franchise than that for the Legislative Council—and twenty-six others. Each Province has also a Governor and a Legislative Council, also popularly elected, which has wide powers of legislation for matters relating to the Province. At present the franchise is necessarily restricted so that it is exercised by only about 7,500,000 out of a computed population of 247,000,000.

**Native States.**—The above account of the Government of India needs to be supplemented by the reminder that not the whole of India is governed directly by British Officials. Large areas still remain under native rulers. Even these, however, are not independent of British authority. Britain has secured the recognition of her overlordship, not by one all-comprehensive act or declaration, but by a gradual process and by dealing individually with each state as opportunity has been afforded. The result is that the relationship of the British Government to the Native States is far from being uniform throughout India, so that no real generalization is possible. Broadly speaking, the native ruler carries out the internal administration of his state while his relationship to outside powers is controlled by the Indian Government. Thus each state is compelled to maintain a military force at a given strength, and, because of the effect on India as a whole, the supreme Government retains the power to maintain means of communication, such as railways and roads, and to construct irrigation works. To safeguard its interests, the Indian Government has a representative at the court of each native ruler.



## 5. IMPERIAL CONFERENCES

We have been concerned so far with the constitution of each of the separate colonies. Two considerations remain, namely, the relationship of the individual colonies to one another, and their relationship to the Imperial Government. We deal with them in that order.

Co-ordination between the individual colonies has been progressively carried out by means of conferences of colonial representatives meeting in England.

**Colonial Conferences.**—The object of the promoters of these conferences—which at first were called Colonial Conferences—was that ultimately there might be evolved for the Empire at large something akin in principle to what had been accomplished in the larger colonies, namely, some form of Federal Constitution, so that a true, Imperial patriotism (or, more correctly, Imperialism) might be evoked. Such Conferences took place in 1887, 1897, 1902, and 1907, and there can be no doubt that they did much to establish mutual understandings and to give the colonies the opportunity directly and openly to express their views about colonial problems and the methods of colonial government. The 1907 Conference resolved that future Conferences should be entitled “Imperial” and that they should meet at least every four years.

**Imperial Conferences.**—The first Imperial Conference was that of 1911, though since 1907 representatives of the colonies had met almost continuously to deal with particular Imperial questions such as navigation and defence. Leaving details on one side, the general effect of the Conferences showed itself in the amazingly unanimous support which the colonies gave to the Home Country at the outbreak of war in 1914, a support



which—apart from the attachment of sentiment—was unquestionably due in no small degree to the understanding which the colonial governments had obtained of Imperial questions through the Conferences.

**Treaty Signatories.**—Another index of the relationship of the colonies to Britain was afforded by the establishment of the Imperial War Cabinet in 1917, and by the recognition in the Peace Treaties of the British Empire. Further, when these Treaties had been agreed to by the colonial Parliaments, they were ratified not only for Great Britain but for the British Empire.

## 6. IMPERIAL GOVERNMENT

The ever-growing complexity of colonial affairs has imposed a corresponding strain upon the governmental machine in Great Britain. Moreover, the varying fortunes of Great Britain with respect to her colonies have been reflected in frequent changes in the organization of the responsible office in London.

**Colonial Secretary.**—As early as 1660 a Privy Council Committee was made responsible for the colonies, and from that date onwards such powers continued to be vested in either a committee or a Minister of State. The loss of the American Colonies changed the entire situation, and, after a period of uncertainty, in 1801 the War Office was made responsible for the colonies. But the burden of the Crimean War (1854) was such that the War Office was given relief by the re-establishment of the Secretary of State for the Colonies, an office which has continued without interruption.

**Functions of Colonial Secretary.**—The functions of the Colonial Secretary are too multifarious to record in detail. The main features of his work are threefold. In the matter of legislation, he is responsible for advising



the King respecting the royal assent to bills submitted by Colonial Legislatures and for communicating to the colonies measures passed by the Imperial Parliament affecting the Empire. The Secretary of State also submits names for appointment as Colonial Governors. Lastly, he is responsible for summoning and making suitable arrangements for the periodical Imperial Conferences.

**Dominions Office.**—In addition to the work thus indicated, there is a constant stream of matters calling for the attention of the Secretary. Indeed, so overwhelming have the duties of the Office multiplied during recent years that the reorganization of the department became imperative. A beginning was made in 1908 when, within the Colonial Office, a separate Dominions Division was created to deal with the Self-governing Colonies as distinct from the Crown Colonies. The logical conclusion of this decision was reached in 1925, when the work was definitely and officially divided between two separate Departments of State. The Colonial Office continued to administer the Crown Colonies, and a new Department of State, known as the Dominions Office, was established. At the head of each of these two Departments was to be a Secretary of State, for the Colonies and for the Dominions respectively. The new Dominions Office came into being forthwith, having a separate Parliamentary Under-secretary of State. Up to the time of writing, the two offices of Secretary of State for the Colonies and Secretary of State for the Dominions have been held by the same man. But the offices themselves are, nevertheless, separate, and it is a question only of the appropriate opportunity for them to be actually divided between two Secretaries. When this has been achieved, the organization of Colonial Government at home will



reflect accurately the governmental conditions of the colonies themselves.

Thus we have traced constitutional development from the days when the only practical constitutional power rested in the folk-moots of parts of a remote little Island, to the time when that Island is the centre of the Constitution of a world-wide Empire.

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